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No. 850

In the Supreme Court of the United States

OCTOBER TERM, 1946

HARRISON WILLIAMS, ET AL., PETITIONERS

v.

CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

The Securities and Exchange Commission submits this brief *amicus curiae* because of the importance of the question presented in the administration of Chapter X. Under Section 208 of Chapter X the Commission is a party to the pending reorganization proceeding for Central States Electric Corporation in the Eastern District of Virginia, and in that capacity supported the trustees' recommendation that the reorganization court authorize the instant suit. The Commission supported, *amicus curiae*, the position of the respondent trustees in the courts below and does so in this brief.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 142–149) is reported at 159 F. 2d 67. The opinion of the District Court (R. 126–138) is reported at 67 F. Supp. 223.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 10, 1946 (R. 149–150). The petition for a writ of certiorari was filed on January 4, 1947, and was granted on February 10, 1947 (R. 151). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a Chapter X trustee, who has discovered in the course of his investigation pursuant to Section 167 of the Bankruptcy Act causes of action against the management of a debtor and affiliated interests, and who has been specifically authorized to sue by the reorganization court, may bring suit thereon in a federal district court other than the one in which the reorganization proceeding is pending, regardless of diversity of citizenship.

STATUTE INVOLVED

Section 2 (a) of the Bankruptcy Act of 1898, as amended (11 U. S. C. 11), provides:

> a. The courts of the United States hereinbefore defined as courts of bankruptcy

are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act * * * to —

* * * * * *

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided * * *.

* * * * *

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction; and * * *.

Section 23 of the Bankruptcy Act of 1898, as amended (11 U. S. C. 46), provides:

a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

Section 102 of Chapter X of the Bankruptcy Act of 1898, as amended (11 U. S. C. 502), provides in pertinent part as follows:

The provisions of chapters I and VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23 * * * shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *.

STATEMENT

The respondents are the trustees of Central States Electric Corporation (hereinafter sometimes referred to as "Central States" or the "debtor"). Central States is a Virginia corporation which had filed a voluntary petition for reorganization in the United States District Court for the Eastern District of Virginia[1] pursuant to Chapter X of the Bankruptcy Act. Respondents' appointment as trustees under Chapter X followed the decision of the Circuit Court of Appeals for the Fourth Circuit in *Matter of Central States Electric Corporation,* 143 F. 2d 684, where the court said (p. 686):

> The great losses sustained by the corporation [Central States] the gross mismanagement shown, the clear abuse of power by corporate officers in contracts made for and with the corporation, the recommendation of the governmental agency charged with the supervision of matters of this sort,—all of these called for an investigation of the most complete and thorough-going character, with opportunity to examine under oath those who had knowledge of the corporation's affairs and with institution of suits for recovery, where probable liability had been shown, to the end that all the processes of discovery provided by law might be fully used.

[1] Hereinafter sometimes referred to as the "Chapter X" or "reorganization" court.

The trustees reported to the reorganization court the results of their investigation and recommended the bringing of the instant suit to recover on behalf of the debtor damages against the present defendants-petitioners for mismanagement of the debtor in their capacity as officers, directors and controlling stockholder of the debtor and as participants in that mismanagement. Pursuant to that report and recommendation of the trustees, the reorganization court authorized and directed the respondents to institute the present action in the United States District Court for the Southern District of New York (R. 4).

The complaint (R. 3–121) alleges that Harrison Williams, as controlling stockholder of Central States, and the other petitioners, fraudulently conspired to waste, destroy, misappropriate and otherwise wrongfully deal with the property and assets of the debtor and that they were guilty of breach of trust and waste of assets. It is further alleged that there was fraudulent concealment by the petitioners of the facts supporting these allegations so that they were not discoverable until after the respondents' investigation was ordered by the Chapter X court on November 15, 1944 (R. 9; 90–93). Respondents, as Chapter X trustees, seek an accounting with respect to losses and profits involved in these transactions and claim damages in excess of $39,000,000, exclusive of interest (R. 89, 93–95).

Petitioners moved to dismiss the complaint upon two principal grounds: (1) that the United States District Court for the Southern District of New York lacked jurisdiction over the subject matter of the action, and (2) that the cause of action was barred by the New York statute of limitations (R. 121–5). The District Court granted the motion on the first ground and did not decide the issue as to the statute of limitations (R. 127–138).[2] Although concluding that it had no jurisdiction over the matter, the District Court stated (R. 137) that—

> As a matter of policy, there does not seem to be any valid reason why the trustee in a reorganization proceeding should not be permitted to institute in a district court, other than the Court of his appointment, a plenary suit against an adverse claimant, such as these defendants, without a showing

[2] The opinion of the District Court states that if it had jurisdiction, the motion would have been denied on the statute of limitations point (R. 138). The District Court expressed no opinion whether, in the event it had jurisdiction under the Bankruptcy Act, it would be required to follow the state statute of limitations. See *Guaranty Trust Company* v. *York*, 326 U. S. 99; *Holmberg* v. *Armbrecht*, 327 U. S. 392. See also *Angel* v. *Bullington*, No. 31, this Term, decided February 17, 1947. The intimation was that if would be necessary to resolve issues of fact before determining whether the cause of action would be barred by the New York statute, if controlling. While the question as to the applicable statute of limitations in the federal court is not presently before this Court, it does have a bearing upon the significance of the issue as to the availability of a federal forum.

of diversity of citizenship as the basis of federal jurisdiction.

The Circuit Court of Appeals reversed the District Court and held that the Bankruptcy Act conferred jurisdiction in this case upon the District Court even though it was not the district court in which reorganization proceedings under Chapter X were pending and regardless of whether there is or is not diversity of citizenship here (R. 142–149).[3] It is this judgment which is now before this Court for review.

SUMMARY OF ARGUMENT

The court below was clearly correct in sustaining the jurisdiction of the District Court and holding that the Bankruptcy Act grants jurisdiction to all district courts (regardless of whether the bankruptcy proceeding in question is there pending) to hear suits *in personam* by Chapter X trustees for the recovery of assets of the estate.

Chapter X is specially adapted to the reorganization of large corporations with multi-state interests. The collection of causes of action against powerful corporate insiders was emphasized in the investigations and studies leading up to the enactment of Chapter X which contained new provisions imposing upon the independent trustee the duty to investigate and prosecute such claims.

[3] The Circuit Court stated (R. 149) that "Since jurisdiction results from the provisions of the Bankruptcy Act, we need not discuss the claim of jurisdiction based on the Judicial Code."

Accordingly, the Chapter X trustee is even more concerned with collection of such claims than an ordinary trustee in bankruptcy, particularly with reference to causes of action against defendants residing outside the district of appointment.

Section 216 (13) of Chapter X unmistakably implies that a Chapter X trustee will at least commence plenary actions prior to consummation of a plan. The importance which Congress attached to such suits indicates an intent to confer a broader choice of venue rather than a narrower one. The legislative trend with respect to choice of forum in actions of this general nature has been to widen the trustee's opportunity to reach defendants. Reorganization courts and the trustees whom they appoint can be trusted not to abuse the jurisdiction thus accorded by flooding the federal courts with trvial suits.

The specific legislative background of Section 102 indicates clearly that it was the express purpose of those who urged exclusion of Section 23 from Chapter X to broaden the jurisdiction of the federal district courts in respect to such plenary suits. This intention was effectuated through the enactment of Section 102 which incorporates Section 2. (a) (7) into Chapter X and specifically makes Section 23 inapplicable. The effect of this was to permit full scope to the broad grant of jurisdiction to the district courts, as set forth in Section 2 (a) (7), to cause the estates of bankrupts (and Chapter X debtors) to be collected and to

determine controversies in relation thereto, the limitations of Section 23 upon the bringing of plenary actions for this purpose having been eliminated by Section 102 of Chapter X.

Section 2 (a) (7) on its face is clearly a source of jurisdiction for all district courts of the United States (which are "courts of bankruptcy" under Section 1 (10) of the Act) over plenary suits *in personam* by trustees for recovery of the assets of the estate.

There is no merit to petitioners' contention that the word "proceedings" as used in Section 2 (a) is a word of art which, regardless of context, is limited to administrative and summary proceedings. Reference to this term as employed in various other contexts in the Act and to the Congressional reports makes it clear that no such narrow meaning is to be attributed to the phrase "proceedings under this Act" as used in Section 2 (a). Moreover, Section 102 includes only those sections of the earlier chapters of the Act which are not inconsistent with Chapter X. This makes it obvious that Chapter X contemplates the exercise of jurisdiction by federal courts as "courts of bankruptcy" over plenary actions *in personam* because otherwise there would be no point in making Section 23, which deals only with plenary actions, inapplicable to proceedings under Chapter X.

Nor is there any merit to petitioners' claim that "courts of bankruptcy" include only the

court in which the petition was filed. Such a contention is repugnant to the definition contained in Section 1 (10) of the Act which expressly states that "'courts of bankruptcy' shall include the district courts of the United States." It is also at odds with Section 2 (a) (20) of the Act which makes plain that all the district courts of the United States are intended to have ancillary jurisdiction, over persons as well as over property, in aid of trustees appointed in other courts.

Dicta found in decisions of this Court relied on by petitioners stand for no more than the proposition that when Section 23 and Section 2 of the Act are both applicable, the former is to be looked to on questions of jurisdiction because of its complete statement as to jurisdiction over plenary suits. These decisions do not hold that Section 23 (b) is the exclusive source of jurisdiction for the bringing of plenary suits. Indeed, reference to the earlier Bankruptcy Act provisions when Section 23 (b) was not in existence and to the decision of this Court in *Lathrop* v. *Drake*, 91 U. S. 516, construing those provisions, makes it clear that Section 2 (a), subject to the limitations of Section 23 (b), affords a broad basis for jurisdiction over plenary suits. Moreover, a number of other opinions of this Court describe more precisely than the cases relied on by petitioners the interrelationship of Sections 2 (a) (7) and 23 so as to indicate that the basic source of jurisdiction is in Section 2 (a) (7) upon which

Section 23 (b) was a limitation. *Kelley* v. *Gill*, 245 U. S. 116, 119; *Whitney* v. *Wenman*, 198 U. S. 539, 549, 550; *Babbitt* v. *Dutcher*, 216 U. S. 102; *Wood* v. *A. Wilbert's Sons Shingle & L. Co.*, 226 U. S. 384; *Collett* v. *Adams*, 249 U. S. 545; *Flanders* v. *Coleman*, 250 U. S. 223.

ARGUMENT

THE DISTRICT COURT HAS JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION UNDER SECTION 2 (A) OF THE BANKRUPTCY ACT WHICH IS MADE APPLICABLE TO PROCEEDINGS UNDER CHAPTER X

Section 102 of Chapter X provides in part:

> The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That Section 23 * * * shall not apply in such proceedings unless an order shall be entered directing that bankrupty be proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *.

Among the sections of the Bankruptcy Act so incorporated in Chapter X and not excluded by the proviso is Section 2 (a) (7), which provides:

> The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with

such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, * * * to—

* * * * * * *

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided * * *.

The "except as herein otherwise provided" clause of Section 2 (a) (7) refers only to Section 23 of the Act,[1] which is expressly made inapplicable to Chapter X proceedings by Section 102. Section 23 provides:

a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings

[1] This Court so stated in *Bryan* v. *Bernheimer*, 181 U. S. 188, 194, and *First Nat. Bank* v. *Title & Trust Co.*, 198 U. S. 280, 288.

> under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

As Mr. Justice Brandeis stated in *Kelley* v. *Gill*, 245 U. S. 116, 119, which involved a plenary action by a trustee in bankruptcy:

> Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." But § 23–b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankrupcy not intervened.[5]

The decision of the court below rests fundamentally on the proposition that, with Section 23 (b) made inapplicable to Chapter X proceedings, the instant suit is maintainable under the broad grant of jurisdiction contained in Section 2 (a) (7).

Section 2 (a) (7), on its face, clearly gives to all district courts of the United States (which are

[5] The actual holding in the case was to deny jurisdiction in the federal court over a suit by the trustee to enforce the liability of the stockholders of the debtor for unpaid stock subscriptions, on the ground specified in Section 23 (b) that the bankrupt might not have brought such suit had bankruptcy not intervened.

"courts of bankruptcy" under Section 1 (10) of the Act and therefore within the scope of Section 2), jurisdiction broad enough to include plenary suits *in personam* by trustees in bankruptcy for recovery of assets of the estate.

Plenary suits *in personam* by a trustee are designed to "cause the estates of bankrupts to be collected" and the courts in which such suits are brought are asked "to determine controversies in relation thereto." Since it is the undisputed responsibility of trustees in bankruptcy under Sections 47 and 11 (c) of the Act to bring such suits, they are "proceedings under this Act" included in the jurisdiction conferred by Section 2 (a) (7) on the courts of bankruptcy. As noted above, these sections are incorporated in Chapter X by Section 102. See also Section 187. It follows that a trustee may bring such plenary proceedings, subject to any applicable restrictions as to forum, either in the court of his appointment or in some other court of bankruptcy. This is further emphasized by Section 2 (a) (20) which authorizes the courts of bankruptcy to "Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

In upholding the jurisdiction of the District Court under Section 2 (a) (7) of the Bankruptcy Act the court below stated (R. 144):

> * * * So broad a grant of power would seem to confer extensive jurisdiction upon the United States courts for the collection of a bankrupt's assets, subject to the usual protective requirements as to service of process within the district and as to venue; and such has been the conclusion of text writers, supported by a holding under the earlier Bankruptcy Act. *Lathrop* v. *Drake*, 91 U. S. 516; 6 Collier on Bankruptcy, 14th Ed., § 3.20, p. 672; Gilbert-Collier on Bankruptcy, 4th Ed. 1937, 63; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act*, 52 *Harv. L. Rev.* 1, 21.

The court below also held that the purpose of the Congress in making Section 23 inapplicable in proceedings under Chapter X was to remove limitations which might otherwise bar access to the federal courts in suits brought by a Chapter X trustee.

Petitioners argue, however, that the words "proceedings under this Act" as used in Section 2 (a) (7) can mean, irrespective of context, only the exclusive and summary jurisdiction of the bankruptcy court which appoints the trustee and that this jurisdiction extends only to directing the trustee to sue (Br. pp. 8–9). Petitioners would thereby restrict the meaning of "proceedings" to summary rather than plenary proceedings, and have the words "determine controversies in relation thereto" mean only the determination of any

administrative dispute as to whether or not suit should be brought, not the determination of any controversies with defendants in suits to collect assets. We show below, pp. 37 *et seq.*, that both of petitioners' restrictive constructions of Section 2 (a) (7) are without merit.

Petitioners also rely on certain decisions of this Court under the Bankruptcy Act of 1898 as intimating, in a context in which both Section 2 (a) (7) and Section 23 are applicable, that Section 23 (b), to the exclusion of Section 2 (a) (7), should be looked to as a source of jurisdiction to bring plenary suits within the limitations set forth in Section 23 (b). Accordingly, they argue that the necessary effect of making Section 23 inapplicable in Chapter X proceedings is to remove a grant of jurisdiction and to narrow access by the trustee to the federal courts rather than to remove limitations thereon.

The historic purpose of Section 23, we will show, was to limit, and specify with particular reference to plenary proceedings, the broad grant of jurisdiction conferred upon the district courts as courts of bankruptcy by Section 2 (a) (7), although in its earlier form Section 23 did grant certain jurisdiction over plenary proceedings to the circuit courts.* However, we believe petitioners'

*Section 23 (a) as originally in effect contained an affirmative grant of jurisdiction over such plenary suits to the circuit courts, which were not courts of bankruptcy as defined in Section 1 (10) of the Act. When the circuit

difference with the court below concerning the historic setting of Section 23 in the Bankruptcy Act of 1898 and the further dispute as to what this Court decided in *Lathrop* v. *Drake*, 91 U. S. 516, with respect to the interpretation of the Bankruptcy Act of 1867, are less relevant to the present issue than what Congress intended by providing in Section 102 of Chapter X that Section 23 of the Bankruptcy Act "shall not apply in" proceedings under Chapter X.

A. THE PURPOSE OF CONGRESS IN ENACTING CHAPTER X WAS TO ENLARGE RATHER THAN RESTRICT THE TRUSTEE'S CHOICE OF FORUM IN BRINGING PLENARY SUITS

As this Court stated in *Securities and Exchange Comm.* v. *U. S. Realty and Improvement Co.*, 310 U. S. 434, 447:

> * * * Chapter X, devised as a substitute for the equity receivership, is specially adapted to the reorganization of large corporations whose securities are held by the public, and sets up a special procedure for the protection of widely scattered security holders and the public * * *.

An aspect of the protection of public security holders in the reorganization of large corporations which was much stressed in the legislative back-

courts were abolished, Section 23 (a) was amended so as to substitute district courts for circuit courts, thereby making Section 23 (a) somewhat repetitious of the grant of jurisdiction already contained in Section 2 (a) (7) and of the limitations stated more explicitly in 2 (b).

ground of Chapter X concerns the problem of investigation and prosecution of claims against corporate insiders. Section 77B had been severely criticized for inadequacy of its provisions to deal with this problem.[7] A Senate report recommending the Chandler Bill (S. Rep. No. 2084, 75th Cong., 3rd sess. p. 2) listed six major abuses of 77B proceedings and summarized the remedy provided by the Bill. We repeat below the first abuse listed and the remedy indicated therefor in the form set forth in that summary:

ABUSES	THE REMEDY PROVIDED BY THE CHANDLER BILL
1. Diversion of assets from the estate and concealment of the facts from creditors.	Chapter 10, article 7, section 167, provides, among other things, that if the judge shall so direct the trustee shall investigate the acts, conduct, and property and shall report to the judge any facts ascertained by the trustee pertaining to the fraud, misconduct, and to any causes of action available to the estate.

[7] The recommendation of the Securities and Exchange Commission which led to enactment of Chapter X stated on this point:

"In every case a qualified and disinterested trustee should be appointed * * * The appointment of an independent trustee is designed * * * to make it impossible to leave these estates in the hands of those whose mismanagement may have given rise to the need for reorganization. * * * the independent trustee should be authorized and directed: to make an investigation in every case of the condition of the company and of the events antedating the failure, with the three-fold objection

Accordingly, Chapter X of the Bankruptcy Act provides for the appointment of disinterested and independent trustees in corporate reorganizations (Section 156, 11 U. S. C. 556) and places upon such trustees the obligation to investigate causes of action against the management and affiliated interests and to bring suit on such causes of action (Section 167, 11 U. S. C. 567).[4] Section 167 (3) of the Act provides that the trustee "shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate." The Senate report stated with reference to this provision that it "insures prosecution of all causes of action," which "in some cases add to the assets of corporations in reorganization."

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* * * (3) of disclosing and diligently pursuing corporate assets in the form of claims against directors, officers, their affiliated interests and others who may have misused corporate control for their personal benefit." Securities and Exchange Commission, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, pt. I (1937), pp. 898-899. Reference to these recommendations is made in S. Rep. No. 1916, 75th Cong., 3d sess., p. 20. Similar recommendations were made in the report of the counsel to the Special Committee of the Senate which investigated Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2d sess., at pp. 29-30.

[4] As previously noted, the Chapter X trustee specifically derives his authority to sue on such claims from Sections 47 and 11 (e), made applicable to Chapters X by Sections 102 and 187. See also Section 216 (13).

S. Rep. 1916, 75th Cong., 3d sess., p. 29. This Court adverted to these provisions in *Brown* v. *Gerdes*, 321 U. S. 178, 182, where it spoke of "the purpose of the Act to protect the security holders against previous acts of mismanagement and to preserve all assets of the estate (S. Rep. No. 1916, 75th Cong., 3d Sess., p. 22; H. Rep. No. 1409 [75th Cong., 1st Sess.], pp. 42–44)." The reorganization proceedings for Reynolds Investing Company, out of which that case arose, illustrate the importance of these provisions. Investigations in that case resulted in judgments for millions of dollars against former officials of the investment company for mismanagement, and the collection of substantial portions of the judgments.

Petitioners brush aside these provisions and argue that according the trustee an opportunity to litigate plenary actions *in personam* in the federal courts is less relevant to the purposes of Chapter X than to other bankruptcy proceedings. They say (Br. 26), "The prime function of a bankruptcy trustee is to liquidate, collect and distribute. The reorganization trustee's purpose is not primarily liquidation but to maintain the *status quo* and to realign interests." They also say "if reorganization efforts fail and liquidation is ordered, the trustee is given an additional aid for liquidation by the grant of jurisdiction over

Section 23."[9] Answering similar arguments the court below stated (R. 148-9):

> Chapter X was enacted largely because of the many abuses which developed in reorganizations under § 77B. One of these was the retention of control over the debtor corporation during reorganization by "insiders" who frequently sought to conceal and to prevent rigorous prosecution of possible causes of action against the debtor's former management. Report on Protective and Reorganization Committees, Pt. 1, S. E. C., 1937, 865; N. Y. Leg. Doc. No. 66, 159th Sess., 1936, 22; Note, 50 Yale L. J. 1492, 1496. To combat this and other abuses the draftsmen of Chapter X strengthened the hand of the reorganization trustee by giving him access to lists of the debtor's security holders, in whosever hands they may be, § 165, 11 U. S. C. A. § 565, by placing upon him the duty of formulating the plan of reorganization, § 169, 11 U. S. C. A. § 569, and perhaps most important, by giving him broad powers of scrutiny of the conduct of the debtor's business by the debtor's former management, § 167, 11 U. S. C. A. § 567. In view of the Congressional purpose demonstrated by these provisions, it seems clear that in eliminating § 23 from corporate reorganizations under Chapter X, Congress intended to enlarge,

[9] Petitioners somewhat inconsistently urge that in view of *Erie Railroad* v. *Tompkins*, "Federal jurisdiction over suits on state-created rights would confer no advantage on the trustee." (Br. 26) Cf. note 2, *supra*, p. 7

rather than restrict; the trustee's choice of forum in prosecuting causes of action against former controllers of the debtor. This is the view of Professor Moore and of Mr. Gerdes. 6 Collier on Bankruptcy, 14th Ed., §3.20 (containing specific criticism of the opinion of the district court); 2 *id.*, § 23.12; Moore' Bankruptcy Manual, 1939, 494; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act* (1938) 52 Harv. L. Rev. 1, 21.

To adopt the narrow construction urged by petitioners with reference to the elimination of Section 23 would be to hold that without diversity of citizenship a Chapter X trustee is unable to sue in the federal courts even where the defendant consents, although a mere trustee in bankruptcy could do so. Another result would be to substitute diversity of citizenship between the trustee and defendant for the rule under Section 23 whereby jurisdiction, in so far as related to diversity, rests upon diversity between the bankrupt and the defendant. Having diversity jurisdiction rest solely upon diversity between the trustee and the defendant, ignoring citizenship of the debtor, could have no relationship to any policy of Congress in connection with Chapter X.

Section 216 (13) of Chapter X refutes petitioners' claim that the collection of assets of the estate through plenary proceedings has no relevance to the duties of a Chapter X trustee with reference to reorganization and becomes relevant,

only in the event of liquidation. Section 216 (13), 11 U. S. C. 616 (13) makes it mandatory for the plan to provide for the retention and continued enforcement by the disinterested trustee of all claims not yet settled or adjusted.[*] This section unmistakably implies that, where warranted by his investigation, a Chapter X trustee will at least start the prosecution of plenary actions against the old management prior to the consummation of a plan. Moreover, reorganization, not an order for liquidation under Section 236, is so much the norm of Chapter X proceedings that the test of "good faith" in the filing of a petition relates *inter alia* to the bona fide expectation that a plan will result. See Section 146 (3). Petitioners' argument that Congress regarded Section 23 as an exclusive grant of jurisdiction with respect to plenary suits, and intended such jurisdiction to be exercised in connection with a Chapter X proceeding only in aid of liquidation, assumes that

[*] Subsection 13 of Section 216 was added in accordance with recommendations made to the Senate Committee on behalf of the Securities and Exchange Commission that "it occurred to us in our reexamination of the bill that the bill does not now indicate the manner in which such claims shall be enforced, either during the proceeding or after the debtor enterprise has been reorganized. We believe this is an omission which should be corrected." See statement of Martin Riger of the staff of the Securities and Exchange Commission, Hearings on H. R. 8046, 75th Cong., 2d sess., p. 124. The explanation accompanying Section 216 (13) states, "Claims retained may be enforced, if necessary, even after consummation of the reorganization." S. Rep. No. 1916, 75th Cong., 2d sess., p. 35.

Congress intended the Chapter X trustee to defer the bringing of suits on meritorious claims on behalf of the estate upon the chance merely that the reorganization purpose would fail and liquidation be ordered. Obviously Congress intended no such impractical course. To the contrary, the importance which Congress attached to the enforcement of causes of action on behalf of the estate demonstrates the relevance to purposes of Chapter X of according the trustee, subject, of course to the control of the reorganization court, a broader choice of forum than is accorded in ordinary bankruptcy proceedings. Significantly Chapter XI, which is a readjustment and not a liquidation statute, but is inapplicable to the larger interstate corporations, retains the limitations of Section 23 with respect to the bringing of plenary suits.

Petitioners argue that the decision of the court below will expose the federal courts to a flood of trivial litigation which might more properly be prosecuted in the state courts, and cite the experience with the Bankruptcy Act of 1867 described in the discussion by the Chairman of the Judiciary Committee which preceded the enactment of the Bankruptcy Act of 1898. See 31 Cong. Rec. 1785, quoted in part by petitioners at Br. 22–23. Reference was indeed made to a situation under the earlier Act in which nearly all plenary suits by bankruptcy trustees were brought in the federal courts. Petitioners' argument,

based on this history of the 1898 Act overlooks both the power of a reorganization court to instruct the Chapter X trustee in respect of his choice of forum as well as the distinction between opening the federal courts to all plenary suits by trustees in bankruptcy and according a more limited federal jurisdiction as to suits deemed of special importance.

It should be noted in that connection that the original limitations in Section 23 of the Act of 1898 with respect to the bringing of plenary suits in the federal courts have been successively and deliberately modified to afford trustees in bankruptcy a wider choice of forum with respect to classes of suits regarded as particularly vital to the bankruptcy process. Thus the 1903 amendments excepted from the limitations of Section 23 (b) actions pursuant to Section 60 (b) and 67 (e) relating to preferences and voidable transfers (Section 8 of the Act of Feb. 5, 1903, c. 487, 32 Stat. 798). Again in 1910 a further exception was made with respect to actions under Section 70 (e) to set aside fraudulent conveyances (Section 7 of the Act of June 25, 1910, c. 412, 36 Stat. 840). The typical claim which Congress was specifically interested in having investigated and prosecuted by Chapter X trustees involved the diversion of assets and related wrongs by insiders and is a counterpart in large corporate affairs of the old-fashioned fraudulent conveyance. It is thus entirely consistent with the legislative trend since 1903 to provide, with

respect to Chapter X proceedings, for this further exception. The only difference between this and the earlier amendments is a matter of mechanics. Instead of adding to the exception clauses in Section 23 (b), Section 102 of Chapter X, which undertakes generally to specify the applicability of Bankruptcy Act provisions in proceedings under Chapter X, lists Section 23 as among the sections made inapplicable.

Petitioners contend that Section 23 (b) is the exclusive source of jurisdiction over plenary suits, and that it was eliminated from Chapter X because that Chapter in no way was concerned with plenary suits.[11] The decisions of this Court make it clear that Section 2 (a) (7) on its face includes a broad source of jurisdiction subject only to the limitations of Section 23 when applicable. Thus, in *Whitney* v. *Wenman*, 198 U. S. 539, 549, 550, this Court stated that in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, "it was held that the power conferred in subdivision 7 of section 2 * * * was limited by the direct provisions of section 23 as to the jurisdiction of suits brought by trustees." In *Kelley* v. *Gill*, 245 U. S. 116, 119, the Court spoke of Section 2 (a) (7) as conferring jurisdiction and

[11] This latter contention is made categorically in several places in petitioners' brief in this Court (Br. 6–7, 25, 27), and it was made without exception thereto in the court below. However, there are several indications in the present brief that they have retreated to some extent from their earlier characterization of Chapter X as wholly unconcerned with plenary suits by the trustee.

continued: "But § 23–b prohibits the trustee * * * from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened * * *." And in *Lynch* v. *Bronson*, 160 Fed. 139, 140 (D. Conn.), the court stated: "subdivision 7 of section 2 would confer jurisdiction if it were not for the limiting words, 'except as 'herein otherwise' provided.' * * * It is settled law that the exception points to section 23. * * *"[12].

The fact that plenary jurisdiction is conferred by Section 2 (a) (7) subject only to the restriction of Section 23, when applicable, is further supported by the legal writers. Thus, for example, in *Gilbert's Collier on Bankruptcy* (4th ed. 1937), p. 63, in discussing Section 2 (a) (7), the authors state: "Unless otherwise provided in the Act, the power conferred by this subdivision appears to be plenary." And in 2 *Collier on Bankruptcy* (14th ed. 1940), par. 23.12, p. 545, it is pointed out that "Section 23 * * * is a *limitation* 'as herein otherwise provided' on the broad grant of jurisdiction conferred on district courts by § 2a (6) and (7), and *must be considered as creating certain restrictions upon the district courts' power* which might otherwise be very extensive due to the

[12] See also *Bryan* v. *Bernheimer*, 181 U. S. 188, 194; *First Nat. Bank* v. *Title & Trust Co.*, 198 U. S. 280, 288.

general language of those provisions." [Italics supplied.] See also 2 Collier, *supra,* at p. 546.

Similarly in Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy* (1935) 20 Iowa L. Rev. 565, the author points out that jurisdiction over plenary actions by the trustees to recover assets of the bankrupt from adverse claimants is granted by Section 2 (a) (7) and that Section 23 has the effect of restricting that grant. Thus he states, *inter alia:*

> Unqualified by Section 23, Section 2 (7) would clearly seem to confer upon the federal district courts jurisdiction over any suit of the trustee to collect assets alleged to be a part of the estate. The difficulty in the Act is created by Section 23 and the extent to which it restricts the extensive grant of jurisdiction in Section 2 (7). * * * [p. 566].
>
> It is * * * apparent that the language of Section 23 cannot be so narrowly interpreted as to annul the grant of jurisdiction in Section 2 (7), but that some moderation must be exercised as to the extent to which it will be permitted to restrict that grant. * * * [p. 567].

The purpose of Congress to give Chapter X trustees a broader choice of forum than is accorded an ordinary trustee in bankruptcy is further illustrated by the specific background of Section 102 of Chapter X and of the inclusion therein of Section 23 as one of the sections of

the Bankruptcy Act which are inapplicable in Chapter X proceedings. It had been the view of Mr. John Gerdes, a member of the National Bankruptcy Conference which sponsored the Chandler Bill, that "the limitations of Section 23 of the Bankruptcy Act must be held to be inapplicable since they are inconsistent with the powers of an equity court, which powers are expressly given to the court in proceedings under Section 77B." 2 *Gerdes on Corporate Reorganization*, page 1478. But this view of Gerdes was questioned. See Finletter, *Principles of Corporate Reorganization* (1937), p. 187. And, after the enactment of Chapter X several courts in cases involving Section 77B proceedings upheld Finletter's view and rejected that of Gerdes. *In re Prima Co.*, 98 F. 2d 952 (C. C. A. 7); *In re Standard Gas and Electric Co.*, 119 F. 2d 658 (C. C. A. 3); *Tilton* v. *Model Taxi Corporation*, 112 F. 2d 86 (C. C. A. 2).

Gerdes appeared before the Subcommittee of the Senate Judiciary Committee which was considering H. R. 8046, the Chandler Bill, and proposed on behalf of the National Bankruptcy Conference a number of specific amendments. Section 102 of the bill then under consideration merely provided "Wherever applicable and not inconsistent with the provisions of this Chapter, the provisions of this Act shall apply in the proceedings under this Chapter." Gerdes' proposal, which was adopted, made expressly inapplicable to proceedings under Chapter X certain enu-

merated sections of the Act, including Section 23. Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 75th Cong., 2d sess., on H. R. 8046, pp. 76-77. Some of these sections but not Section 23 had been expressly made inapplicable to Section 77B proceedings under Section 77B (k). In that connection Gerdes said (Hearings, p. 77):

> Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions [as] are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. * * *
>
> In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X.

Subsequently, Mr. Gerdes commented upon this change as follows (*Corporate Reorganizations:*

Changes Effected by Chapter X. of the Bankruptcy Act (1938) 52 Harv. L. Rev. 1, 21):

> The bankruptcy provision restricting plenary jurisdiction has been expressly excluded from application so that the equity receivership jurisdiction over plenary actions which are ancillary to the main proceedings is still available, even though the controversy involves less than $3,000 and even though there is no diversity of citizenship.

Professor Moore expressed a similar view with respect to Section 102. In *Moore's Bankruptcy Manual* (1939), p. 494, he said—

> Sections 23 (a) and (b) limit the jurisdiction of the United States district courts in plenary suits against adverse claimants (other than those by a trustee to set aside preferences or fraudulent conveyances) to cases where the defendant has consented or the bankrupt could have brought such suit in a federal court. *Their express elimination from reorganization proceedings makes it clear that plenary suits by trustee or receiver are maintainable in the federal courts as ancillary to bankruptcy reorganization whether or not separate grounds for federal jurisdiction exist.* [Italics supplied.]

In *In Re Standard Gas and Electric Co.*, 119 F. 2d 658, the Circuit Court of Appeals for the Third Circuit clearly implied that the effect of the enactment of Chapter X was to remove a pre-

existing barrier to plenary suits, but held that since the case before it involved a suit by a section 77B trustee instituted prior to the enactment of Chapter X, it was not maintainable in the federal court in the absence of diversity. See also *Brown* v. *Gerdes*, 321 U. S. 178, in which this Court likewise assumed, although it was not necessary to the decision, that the elimination of Section 23 had the effect of broadening the availability of the federal courts in the case of plenary suits by a Chapter X trustee.

In *In re Cuyohoga Finance Company*, 136 F. 2d 18, 20 (C. C. A. 6), the court referred to the enactment of Chapter X as follows:

> One of the purposes of the statute was the enlargement of the jurisdiction of the court. The restrictions of Section 23 (11 U. S. C. A. Sec. 46) were abrogated unless the proceeding degenerated into ordinary bankruptcy. The statute expanded the former Act to give the court in reorganization proceedings such jurisdiction as a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet debts as they matured. 11 U. S. C. A. Sec. 515, 52 Stat. 884.

See also *Warder* v. *Brady*, 115 F. 2d 89, 93, 94 (C. C. A. 4), *In re Quick Charge, Inc.*, W. D. Okla., January 27, 1947, C. C. H. Bankruptcy Law Service, par. 55,835, at p. 58,069.

Despite their principal argument that Chapter X was intended to withdraw from the trustee the authority which an ordinary bankruptcy trustee has to maintain plenary suits in the federal courts, petitioners offer the inconsistent suggestion that, in eliminating Section 23 from Chapter X proceedings, Congress intended to remove a limitation which Section 23 had been held to impose upon the equity receivership power of a Section 77B court over plenary actions conferred by Section 77B (k), the predecessor of Section 115 of the Bankruptcy Act. Thus, petitioners state that the elimination of Section 23 from Chapter X was intended only to make clear that the court in which the petition was filed would have the jurisdiction which a court of the United States would have if it had appointed an equity receiver. Petitioners concede the power in the court of appointment to litigate plenary claims (Br. 28). In describing this jurisdiction as ancillary, petitioners refer to the equity receivership practice under which plenary suits could be brought, irrespective of diversity, either in the federal court of original appointment or in another federal court which had appointed an ancillary receiver. Petitioners argue that this practice precluded appointment of an ancillary receiver unless there was tangible property as distinguished from an *in personam* claim against the defendant, within the district where ancillary jurisdiction was sought. See

Mitchell v. *Maurer*, 293 U. S. 237, 243. Petitioners suggest (1) that when Section 115 states "upon the approval of a petition, the court" shall have the same powers as if it had appointed an equity receiver, the reference to *the court* (italicized by petitioners) means only the court of appointment, and (2) that any other federal court has jurisdiction to entertain a plenary suit by a Chapter X trustee without regard to diversity of citizenship only if it could have entertained a petition for the appointment of an ancillary receiver under the equity precedents (Br. 27–29).

Once it is concluded, however, that Congress intended, by making Section 23 inapplicable, to enlarge rather than to restrict access to the federal courts in the case of plenary suits brought by a Chapter X trustee, then there is, we submit, no rational basis for assuming that the enlarged jurisdiction thereby conferred upon the federal courts was intended to be hedged with venue restrictions which would defeat recovery by preventing suit where potential defendants might be amenable to process. Even if it were held, contrary to a number of decisions in circuit courts of appeals, that process of the reorganization court may be served throughout the United States for the purpose of proceeding *in personam* as well as to protect the court's exclusive jurisdiction over the property of the debtor,[13] there would

[13] See *In re of Standard Gas & Electric Co.*, 119 F. 2d 658 (C. C. A. 3); *In re Prima Co.*, 98 F. 2d 952 (C. C. A. 7).

be no reason to preclude seeking, on grounds of convenience, an alternative federal forum in another district wherein defendants might reside. There is thus no basis in policy or in the text of the sections of the Act applicable to Chapter X for reading into the new grant of power the cumbersome and artificial limitations upon the territorial jurisdiction of the reorganization court which it was a common purpose of Section 77B and Chapter X to remove.

The trustees argue that the term "court" as used in section 115 includes any court of bankruptcy. We do not find it necessary to rest our argument on this interpretation of Section 115 by itself, inasmuch as section 2 (a) (20) expressly gives "ancillary jurisdiction" to the courts of bankruptcy "over persons or property within their respective territorial limits in aid of a receiver or trustee appointed * * * in any other court of bankruptcy."[1] With the limitations of section 23 removed, there is no reason why Section 2 (a) (20) does not, to the extent necessary, cover ancillary jurisdiction in aid of the Chapter X trustee's functions *qua* equity receiver as well as in aid of his explicit functions *qua* trustee to collect assets of the estate. In either capacity we believe it clear that Congress intended by the excision of Section 23 to effectuate a comprehensive federal jurisdiction to col-

[1] Section 2 (a) (20) is incorporated into Chapter X by Section 102 thereof.

lect the assets of an estate in aid of a Chapter X reorganization.

B. THE COURT BELOW PROPERLY REJECTED PETITIONERS' CONTENTION THAT THE REFERENCE TO "PROCEEDINGS" AND "CONTROVERSIES" IN SECTION 2 (a) (7) WAS ONLY A REFERENCE TO SUMMARY PROCEEDINGS, AND THAT SECTION 102 WAS DESIGNED SOLELY TO MAKE SECTION 23 INAPPLICABLE TO ADMINISTRATIVE PROCEEDINGS IN THE CHAPTER X COURT

Petitioners urge here, as they did in the court below, that wherever the term "proceedings" is found in the Bankruptcy Act it refers, irrespective of the context in which it appears, to summary proceedings only and not at all to plenary actions such as the suit involved in this case. More specifically, the argument is that the grant of jurisdiction in Section 2 (a) of the Act is limited to "proceedings," i. e., summary proceedings, and that when Section 102 of the Act makes Section 23 inapplicable "in proceedings under Chapter X" it refers only to the administrative proceedings in the court of appointment. The *in personam* jurisdiction of the bankruptcy courts, according to their view, is derived only from Section 23, which gives the district courts "jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act," between trustees and claimants of property. Since this section is expressly made inapplicable to a reorganization proceeding unless an order is entered that liquidation be proceeded with (Section 102), petitioners claim that the Bankruptcy Act confers upon the district courts no

jurisdiction over a plenary suit brought by a Chapter X trustee.

This argument is based on an attempt to define the term "proceedings" very narrowly. It rests upon the assumption that, whenever used in the Act, the term "proceedings" is a word of art referring to the proceeding in bankruptcy or reorganization as such, and only that. Reference to a number of provisions of the Act makes it clear that the term has no such fixed meaning; rather, its meaning depends on the context in which it is used. At times the word "proceeding" is used interchangeably with "suit" or "action," at times to indicate bankruptcy proceedings of an administrative character, and at other times to signify both. For example, in Section 11 (e) trustees are authorized to "institute proceedings in behalf of the estate upon any claim * * *;" and in another connection, the same section refers to "any proceeding, judicial or otherwise"; and in Section 60 (b) "plenary proceedings" to recover preferences, or their value are authorized to be brought in a state court or "any court of bankruptcy."[15] These sections of the Act incorporated into Chapter X by Section 102 thereof, in pertinent part provide:

> Sec. 11(e) A receiver or trustee may * * * institute proceedings in behalf of

[15] By definition "'courts of bankruptcy' shall include the district courts of the United States * * *." (Sec. 1 (10)).

> the estate upon any claim * * * Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, * * * or where in any proceeding, judicial or otherwise, a period of limitation is fixed, * * * the receiver or trustee of the bankrupt may, * * * take any such action or do any such act * * *.
>
> Sec. 60 (b) * * * Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property. * * * For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

See also Section 70 (e) (2), which authorizes the trustee to recover property fraudulently transferred or to collect its value, and Section 70 (e) (3), which describes actions pursuant thereto as "plenary proceedings."

The Congressional reports also use the term "proceedings" in appropriate contexts to include suits. For example, in discussing actions by trustees and receivers, the House Report on Revision of the Bankruptcy Act described the proposed new Section 11 as authorizing prosecution of "suits" by receivers and trustees; nevertheless in the statute (Section 11 (c)) such suits are described both as

"proceedings" and as "suits." In discussing the provisions of Section 70 (e) (3) the committee used both terms "action" and "proceeding" interchangeably.[16] H. Rep. 1409, 75th Cong., 1st sess. pp. 20, 35. Moreover, Section 2 (a) (7) confers jurisdiction necessary for the collection of the estate which includes plenary suits *in personam.* Finletter, *Principles of Corporate Reorganization* (1937), pp. 190–200. That the collection of assets implies and includes jurisdiction to bring plenary suits was quite early recognized in *White* v. *Ewing,* 159 U. S. 36. The Court in referring to the jurisdiction of a circuit court to entertain a plenary suit by an equity receiver stated (p. 40):

> In this particular the jurisdiction of the Circuit Court does not materially differ from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted.

A similar view is indicated in *Kelley* v. *Gill,* 245 U. S. 116, 119, where in considering the lower court's jurisdiction over a plenary suit, Mr.

[16] "Clause (3): The provision with respect to concurrent jurisdiction appears in the present 70e. It has been expanded * * * where in a particular case a plenary action may be found necessary or advisable, and specifically provides that the concurrent jurisdiction shall relate only to plenary proceedings. For the sake of clarity and certainty the order in which the courts are mentioned is reversed." H. Rep. 1409, 75th Cong., 1st sess., p. 35.

Justice Brandeis referred to the jurisdiction conferred by Section 2 (a) (7) to collect the assets of the estate, subject to the limitations of Section 23 (b). It is petitioners' hypothesis that collection of the assets denotes only administrative and summary proceedings. Even assuming that "collection" has such a narrow meaning, it is clear that the additional jurisdiction conferred by Section 2 (a) (7) to "determine controversies in relation thereto" presupposes claims of adverse parties and the need at times for plenary action to effectuate the collection of the estate.[15]

Indeed, in the light of clause (20) of Section 2 (a), which confers upon a court of bankruptcy ancillary jurisdiction over "persons" as well as property in aid of a "trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy", it is clear that the jurisdiction conferred by Section 2 (a) includes in personam suits against adverse parties as well as purely administrative proceedings.

The fallacy in petitioners' argument is also illustrated by reference to Section 102 which makes certain other chapters of the Act applicable "in proceedings under this chapter [XI]." Petitioners' contention that Section 102 includes

[15] Further indication that collection of assets includes the bringing of suits is to be found in Section 70 of the Act. Clause (e) (2) authorizes the trustee to recover property or to "collect its value" and Clause (e) (5) provides for "plenary proceedings" in respect thereto.

only reorganization proceedings as such is inconsistent with the obvious purpose of Congress in making Section 23, which deals with plenary actions, inapplicable "in such proceedings." It is patent that unless such proceedings included plenary suits pursuant to Chapter X, there would have been no need to insert the proviso removing Section 23. The conclusion that Congress so intended is reinforced by reference to the fact that Section 102 specifically makes inconsistent provisions inapplicable and hence it was only because Section 23 might have been held applicable to proceedings under Chapter X that it was necessary to exclude it therefrom by specific reference. As the court below stated (R. 147, note 4), "* * * defendants' contention that Chapter X embraces only administrative proceedings in rem is not well taken. Under such a view, § 102 would be rendered meaningless, as purporting to prevent a section dealing solely with jurisdiction in personam from affecting proceedings in rem." Thus, the proviso in Section 102 makes it clear that the phrase "in proceedings under this chapter" includes plenary proceedings brought by a trustee.

Petitioners' further assertion that "courts of bankruptcy" include only the court in which the petition was filed is repugnant to the definition contained in Section 1 (10), which expressly states that "'Courts of Bankruptcy' shall include the district courts of the United States," and is

at odds with other provisions of the Act. Section 60 (b), for example, confers jurisdiction on "any court of bankruptcy" for "plenary proceedings" necessary to obtain reimbursement of preferences or their equivalent value, and *Collet v. Adams*, 249 U. S. 545, and *Lowenstein* v. *Reikes*, 54 F. 2d 481 (C. C. A. 2), make it clear that "courts of bankruptcy" include courts of the United States other than the court in which the petition was filed. See also Section 2 (a) (19) and (20) which expressly provide that the district courts of the United States are created "courts of bankruptcy" with jurisdiction to "(19) Transfer cases to other courts of bankruptcy;" and "(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy * * *."

C. THIS COURT'S CONSTRUCTION OF A SUBSTANTIALLY IDENTICAL PROVISION IN THE BANKRUPTCY ACT OF 1867 SUPPORTS THE VIEW OF THE COURT BELOW THAT SECTION 2 (a) (7) CONFERS JURISDICTION OVER THIS ACTION

Petitioners rely heavily upon certain dicta in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, and *Schumacher* v. *Beeler*, 293 U. S. 367, to support their contention that Section 23 of the Bankruptcy Act is the sole source of jurisdiction in plenary suits by a trustee against adverse claimants rather than a limitation on jurisdiction granted by Section 2. The court below rejected

these cases as authorities because the expressions were only dicta in any event, and, further, because the dicta were erroneous in so far as they might be construed as intimating that Section 2 would not be a source of jurisdiction over plenary suits apart from Section 23.

The dicta in question are only indirectly relevant to the questions here presented, since they deal with situations under the Bankruptcy Act of 1898 where both Section 23 and Section 2 were applicable, and refer back to the Act of 1867 for its bearing upon the interpretation of the 1898 Act. While we believe the intention of Congress as specifically revealed in connection with the enactment of Chapter X controlling in any event, we nevertheless discuss the *Bardes* and *Schumacher* cases because of the great emphasis petitioners place upon them.

At the time of the *Bardes* case, Section 23 read as follows (30 Stat. at 552–553):

> SEC. 23. *Jurisdiction of United States and State Courts.*—a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had

been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Section 23 (a) was thus a grant of jurisdiction to the circuit courts in respect of suits to the same extent as though the bankrupt were suing in the absence of bankruptcy. Section 23 (b) then stated in negative language that suits by the trustee shall only be brought, unless by consent of the defendant, in courts where the bankrupt might have sued. To the extent that 23 (b) applied to plenary suits in the district courts, which courts are not mentioned in either 23 (a) or 23 (b), it was obviously a limitation upon jurisdiction elsewhere granted and the only place to look for that grant of jurisdiction to the district courts was 2 (a) (7), which then read substantially as it does today.[18]

[18] In *Lowenstein* v. *Reikes*, 54 F. 2d 481 (C. C. A. 2), Judge Swan, in his dissenting opinion, made the follow-

Between the *Bardes* and the *Schumacher* case there had been the successive amendments to Section 23 in 1903 and 1910 which excepted from the limiting language in 23 (b) certain specified kinds of plenary suits. In addition, with the abolition of the circuit courts in 1911, the words "district court" were in effect substituted generally for "circuit court" and this later led to corresponding changes in the text of the Bankrupt Act itself. The 1903 and 1910 amendments had the effect of enlarging the jurisdiction of district as well as circuit

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ing illuminating statement on the restrictive nature of Section 23. He stated at p. 485:

"The exception 'herein otherwise provided' [in Section 2 (a) (7) of the present Bankruptcy Act] refers to section 23. Paragraph (a) of section 23, as originally enacted (30 Stat. 552), related only to the Circuit Courts. It invested them with 'jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees,' but limited it to the same extent as though bankruptcy had not intervened and the controversy were between the bankrupt and the adverse claimant. *Bush* v. *Elliott*, 202 U. S. 477, 26 S. Ct. 668, 50 L. Ed. 1114; *Goodier* v. *Barnes*, 94 F. 798 (C. C. N. Y.). Paragraph (b) of section 23 as originally enacted (30 Stat. 552) read as follows: 'b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'

"As to plenary suits instituted by the trustee in the bankruptcy court to recover property in the possession of the adverse claimant, it is apparent that this subdivision was intended *to limit the jurisdiction which section 2* (7),

courts and were in that sense grants of jurisdiction to the district courts, even though this result was achieved by merely limiting the extent to which 23 (b) cut down jurisdiction which might otherwise have been granted by Section 2 (a) (7).

Against this background it is entirely understandable that the Court, in cases where it was not necessary to decide the effect of Section 2 (a) (7) standing alone, referred to Section 23 as a

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11 USCA § 11 (7), would otherwise have conferred upon courts of bankruptcy 'to determine controversies' in relation to the collection of the estates of bankrupts, to suits brought by the trustee with the consent of the defendant. See *In re Abraham*, 93 F. 767, 774 (C. C. A. 5). Hence, it was held in *Bardes* v. *Hawarden Bank*, 178 U. S. 534, 20 S. Ct. 1000, 44 L. Ed. 1175, that, where the defendant had not consented, the court of bankruptcy had no jurisdiction of a suit by a trustee to set aside a fraudulent conveyance. * * * Of course it was implied that with consent such a suit might be brought in the court of bankruptcy; and so it was later held. *Phillips* v. *Turner*, 114 F. 726 (C. C. A. 5); *In re Durham*, 114 F. 750 (D. C. Md.); *Boonville Nat. Bank* v. *Blakey*, 107 F. 891 (C. C. A. 7). But such consent was seldom given." [Italics supplied.]

We do not understand the majority of the court in *Lowenstein* v. *Reikes* to have rejected or controverted any part of the language quoted above from Judge Swan's dissenting opinion. The issue in the case was whether a suit by a trustee in bankruptcy, brought in a federal district court to avoid a preferential transfer made by the bankrupt prior to bankruptcy, is a "controversy arising in bankruptcy proceedings from a court of bankruptcy" within the meaning of Section 24 (a) of the Bankruptcy Act. The majority held that Section 24 (a) was not applicable and that therefore Section 25 (a), requiring an appeal to be taken within 30 days after judgment or decree, was also inapplicable.

grant of jurisdiction to the district courts. On the other hand, a number of other opinions of this Court described, we submit, more precisely the interrelationship of Sections 2 (a) (7) and 23 so as to indicate that the basic source of jurisdiction is in Section 2 (a) (7), on which Section 23 (b) is a limitation. See *Kelley* v. *Gill*, 245 U. S. 116, 119; *Whitney* v. *Wenman*, 198 U. S. 539, 549–550; *Babbitt* v. *Dutcher*, 216 U. S. 102; *Wood* v. *A. Wilbert's Sons Shingle & L. Co.*, 226 U. S. 384; *Collett* v. *Adams*, 249 U. S. 545; *Flanders* v. *Coleman*, 250 U. S. 223.

But, in any event, the language in the *Bardes* and *Schumacher* cases, upon which petitioners rely, rests upon a misconception of the interpretation given to the Act of 1867 by this Court's earlier decision in *Lathrop* v. *Drake*, 91 U. S. 516.

The Circuit Court of Appeals rejected the contention which petitioners now make in this connection and summarized its view of the matter thus (R. 146):

> These statements [in the *Bardes* and *Schumacher* cases] suggest that by an analogy drawn from the language of the Bankrutcy Act of 1867, § 2 of the present Act is a grant of summary jurisdiction only.
>
> The two cases apparently derived that conclusion from an interpretation of *Lathrop* v. *Drake, supra*, a decision which construed the Act of 1867 *and which, it seems now clear, should not be so interpreted.* It was

there held that the jurisdiction of the district courts over civil suits came from § 1 of that Act, which is now substantially embodied in § 2 of the present Act; and that § 2 of the 1867 Act, now repealed, which the two former cases regarded as the source of jurisdiction over civil suits, merely conferred a concurrent jurisdiction upon the circuit courts. The former cases, morever, were decided not under the Act of 1867, but under the Act of 1898; and they were concerned not with a construction of § 2, but with the applicability of § 23. *The statements in them from which defendants claim support are therefore merely dicta, and do not sap the vitality of the jurisdictional holding in the early case.* [Italics supplied.]

As the court below indicated, Section 2 of the present Bankruptcy Act of 1898 was derived from Section 1 of the Bankruptcy Act of 1867, and the two provisions are substantially identical as to the jurisdiction of the district courts. *Babbitt* v. *Dutcher*, 216 U. S. 102, 107; *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 534.[19] Although we do not believe that it is necessary to rely upon Section 1 of the Act of 1867 in order to reach the conclusion that Section 2 (a) (7) grants jurisdiction in this case, an examination of the earlier provision dis-

[19] In the *Bardes* case the Court stated (178 U. S. at 534) that Section 2 of the Bankruptcy Act of 1898 "takes the place of section 1 of the Act of 1867, and hardly differs from that section" except in certain particulars here not relevant.

closes strong support for the conclusion we advocate.

Preliminarily, it is worthy of note that the Act of 1867 contained no restrictive provision of the nature of Section 23 of the 1898 Act. Thus, Section 1 of the earlier Bankruptcy Act and Section 2 (a) (7) of the present Act, which is not in any way controlled or limited by Section 23 in proceedings brought by a Chapter X trustee, are even more identical than is the case where Section 23 is applicable, as in the *Bardes* and *Schumacher* cases.

Section 1 of the Bankruptcy Act of 1867, 14 Stat. 517–518, provided:

> That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. * * * And the jurisdiction hereby conferred shall extend * * * to the collection of all the assets of the bankrupt * * *

Section 2 of the Act of 1867, which has no counterpart in the present Act, provided that "the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and

questions arising under this act * * *; and further, that—

> Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity * * * brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.

The controlling interpretation of Section 1 of the Act of 1867 was given by this Court in *Lathrop* v. *Drake*, 91 U. S. 516. The question there presented was whether under the Bankruptcy Act of 1867 an assignee in bankruptcy "without regard to the citizenship of the parties could maintain a suit for the recovery of assets in a circuit court of the United States in any district other than that in which the decree of bankruptcy was made."

Observing that the jurisdiction granted to the circuit courts in Section 2 was concurrent with the jurisdiction granted in Section 1 of the Act to the district courts (Section 2 makes "such direct reference to the jurisdiction of the District Court"), this Court first analyzed the jurisdiction granted to the district courts by Section 1 of the Bankruptcy Act of 1867. The apparent explanation for the erroneous interpretations given to the *Lathrop* opinion in the *Bardes* case is that the Court did not there specifically name the provision giving jurisdiction to the district courts as "Sec-

tion 1." Instead, it simply discussed the provisions of Section 1 (in sufficient detail as to preclude any possibility that the Court was discussing Section 2 the provisions and language of which are quite different) and took for granted that it would be understood that Section 1 was being referred to. We believe this can be conclusively shown by quoting from the opinion *in extenso*, with some explanatory interpolations of our own in brackets. The court stated at pp. 516–519:

> The jurisdiction of the circuit courts in cases of bankruptcy, as conferred by the act of 1867, was twofold,—original and appellate * * *. But the enacting clauses which confer this jurisdiction [Section 2] make such direct reference to the jurisdiction of the District Court, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy * * *; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. [This is obviously the language of Section 1, for Section 2 does not contain any of the language referred to in the following discussion of the Court.] It is, that they shall have original jurisdiction in their respec-

tive districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified [in Section 1]; resulting, however, in the two general classes before mentioned. Were it not for the words, 'in their respective districts' [words appearing only in Section 1], the jurisdiction would extend to matters of bankruptcy arising anywhere, without regard to locality. It is contended that these words confine it to cases arising in the district. But such is not the language. Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. * * * the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; *and it may be necessary*

for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. * * * The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman* v. *Bingham*, 7 Bank. Reg. 490; and *we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy.*

Turning now to the jurisdiction of the circuit courts, we find it enacted in sect. 2 of the act of 1867 * * * Reverting to the language used in the second clause [of Section 2] above cited, it seems to be express and unqualified, that the Circuit Court shall have concurrent jurisdiction with the district courts of the same district. If, therefore, the District Court has jurisdiction of suits brought by an assignee appointed in another district, the Circuit Court of the same district has concurrent jurisdiction therewith. There is no escape from this conclusion * * *.

If jurisdiction was conferred (as we have seen it was) on the various district courts to entertain suits brought by assignees appointed in other districts, there seems to be no reason why the same jurisdiction should

not have been conferred on the various circuit courts, but on the contrary, very cogent reasons why it should have been. Important cases would be very likely to arise, both in amount and in the questions involved, which it would be desirable to bring directly before the Circuit Court, in order, if necessary, that an early adjudication might be had in the court of last resort. [Italics supplied.]

In *Sherman* v. *Bingham*, 3 Cliff. 552, 7 Nat. Bank Reg. 490, Fed. Case No. 12762 (C. C. D. Mass.), cited with approval by this Court in the *Lathrop* and *Schumacher* cases, an assignee in bankruptcy sued in assumpsit in a district other than where the bankruptcy proceedings were pending to recover certain moneys. Mr. Justice Clifford, sitting on circuit, reversed the judgment of the district court which dismissed the action because it thought it lacked jurisdiction. Referring to the Act of 1867, he said (3 Cliff. at 553–554):

> No such limitation, however, is found in the clause of § 1 conferring jurisdiction upon the District Courts as courts of bankruptcy. * * * On the contrary, the same section provides that the jurisdiction * * * of the several district courts, shall extend * * * to the collection of all the assets of the bankrupt; * * *.
>
> Unless the assignee can collect what is due to the bankrupt he can never perform the duty assigned to him as the representative of the bankrupt, and § 1 of the act expressly

> provides that the jurisdiction of the District Courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters, and things to be done under, and in virtue of the bankruptcy. Nothing of greater importance is required to be done under and in virtue of the bankruptcy than the collection of the assets belonging to the estate of the bankrupt. Bankrupts, as all experience shows, have debts due them in districts other than the one where the proceedings against them are instituted * * *.

Thus it is clear that the *Lathrop* case holds that the general jurisdictional section of the Act (Section 1 of the Act of 1867, now Section 2 of the present Bankruptcy Act) conferred power on all of the district courts to hear cases in their respective districts involving suits brought by an assignee or trustee in bankruptcy.

The Act of 1867 was similarly explained in a very full and lucid decision in *Goodall* v. *Tuttle,* Fed. Case No. 5533 (W. D. Wis.), which was cited with approval and relied upon by this Court in *Babbitt* v. *Dutcher,* 216 U. S. 102, involving the Bankruptcy Act of 1898 and decided ten years after the *Bardes* decisions.[20] In the *Goodall* case

[20] In the *Babbitt* case the Court cited the holding in the *Goodall* case and in two other cases and said: "On the authority of these decisions it must be and is conceded that under the bankruptcy acts of 1841 and 1867 ancillary jurisdiction, both in summary proceedings and in plenary suits, existed in all District Courts within their respective districts * * *." 216 U. S. at 111.

the court stated *inter alia* with reference to the Bankruptcy Act of 1867 (10 Fed. Cas. at 580):

> As I have before said, the right to proceed in the district court by the ordinary and plenary modes of actions at law or in equity, as between party and party, is not expressly conferred in the act, but as stated by Chase, C. J., in Re Alexander [Case No. 160], "This jurisdiction may be well enough held to be included in the general grant of the first section." * * *
>
> The second section does not profess or attempt to confer or regulate the jurisdiction of the district courts. That relates exclusively to the circuit court. But it may with propriety be said to assume the existence of this jurisdiction in the district courts. That section clothes the circuit court with concurrent jurisdiction with the district court in certain (not all) cases arising under the act, but not of the character of this case, so it is not necessary to define or discuss its extent or meaning. *I say by that section, congress assumed the jurisdiction of the district court in all cases, and that it was conferred by section 1, for if it is not found in that it does not exist. And in that assumption there is a very clear legislative construction of the extent and meaning of section 1.*
>
> To be more specific than Chief Justice Chase, I think it may well be held to be included in the express and general power "to the collection of all the assets of the bankrupt" [Section 1]. [Italics supplied.]

In the course of its opinion in *Goodall* v. *Tuttle*, the court stated its conclusion that no satisfactory or plausible reason could be advanced for permitting an assignee in bankruptcy to sue for the collection of the debtor's assets in the district court appointing him, that does not apply, with equal force, in favor of his right to sue in any other district. And, asked the court (p. 581), "if no reason for such distinction can be assigned, why impute to congress an intention to create one?"[21] The court ended by saying (10 Fed. Cas. at 582):

> I have not undertaken to define with accuracy the character or extent of the jurisdiction of the circuit courts under the second section, as I do not see that that section sheds any light upon the jurisdiction of the district courts as conferred by section one.

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[21] "The act further confers the power upon the district courts to collect all the assets of the bankrupt, and to do all other acts necessary to be done in virtue of the bankruptcy. This by implication confers the authority upon the district courts to entertain jurisdiction of suits in the name of the assignee against third persons, either at law or in equity, for the collection of the debts and property of the bankrupt; and as such jurisdiction is not expressly limited to the district courts where the proceedings are pending, and as no reason exists for such limitation, the courts are not warranted in restricting its exercise to such district." *Goodall* v. *Tuttle*, 10 Fed. Cas. at 582.

On the basis of the foregoing we believe it clear that the reference in the opinion in the *Bardes* case to *Lathrop* v. *Drake* was a misinterpretation both of the *Lathrop* case and of the provisions in the Bankruptcy Act of 1867 dealt with in *Lathrop* v. *Drake*, 91 U. S. 516.[22] We refer to that portion of the *Bardes* opinion which states (178 U. S. at 531):

> And the jurisdiction of the District and Circuit Courts over suits to recover assets of the bankrupt from a stranger to the pro-

[22] The *Bardes* case appears to rest, insofar as it discusses the Act of 1867, not upon an independent analysis of that Act but upon a misreading of the opinion in the *Lathrop* case which *did* involve the Act of 1867. In the *Bardes* case a trustee in bankruptcy of the estate of an individual who had gone into voluntary bankruptcy had filed suit in the federal district court in which bankruptcy proceedings had been commenced to set aside an allegedly fraudulent conveyance made by the bankrupt prior to bankruptcy. The defendants did not consent to such a suit and the crucial question was whether Section 23 (b) was applicable to such a suit. If it was, then the district court could not exercise jurisdiction here without consent of the defendants. This certified question, an affirmative answer to which obviated the need for consideration of any other questions (discussion of which could be only *obiter dictum*), was answered by the Court thus:

"The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors." (178 U. S. at 539.)

> ceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld [in the *Lathrop* case] not under the provisions of Section 1 of that act [of 1867], giving to the District Court original jurisdiction of proceedings in bankruptcy, and of Section 2, giving to the circuit court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of Section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity * * *.

A comparison of what the Court in the *Bardes* case thought was said in the *Lathrop* case with the actual language in that case makes clear that the *Bardes* opinion erred. We desire to emphasize, however, that this error did not in any way affect the ultimate decision and result in the *Bardes* case because the Court was squarely faced with Section 23, which was there applicable, and unquestionably Section 23 did restrict the jurisdiction of the district courts as the *Bardes* opinion held.[23]

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[23] In Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy* (1935) 20 Iowa L. Rev. 565, 569, the author, in criticizing *Bardes* v. *Hawarden Bank*, emphasizes that the holding of the case "would seem to have given undue weight to Section 23b while failing to give any effect to the grant of jurisdiction under Section 2 (7) in violation of a cardinal principle of statutory interpretation that an exception ought not to be so construed as to wholly destroy

Petitioners also rely upon *Schumacher* v. *Beeler*, 293 U. S. 367. In that case the Court repeated the erroneous interpretation of the jurisdictional provisions of the Act of 1867. The error may be attributed to the Court's complete reliance upon the language in the *Bardes* case which dealt with the Act of 1867 (see 293 U. S. 367 at 371-2). Furthermore, the *Schumacher* case is entirely inapplicable here for, as the Court there stated (293 U. S. at 370-1):

> The case * * * turns on the effect of the sheriff's consent under § 23 (b). The sheriff contends that he had no authority to give the consent; but he was the defendant in the suit and his consent was actually given. We find no ground for concluding that the consent was invalid.

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the grant to which it is attached." Ross further continued (p. 570):

"The court in the *Bardes* case * * * entirely overlooked the force of Section 23 (a). It is likewise significant that the grant of jurisdiction in Section 2 is limited to district courts while the restriction in Section 23 (a) was confined to circuit courts. An interpretation of the Act which would have harmonized its provisions would have been to recognize Section 2 (7) as conferring jurisdiction upon district courts over all suits by the trustee subject only to a venue restriction of Section 23 (b) waivable with consent of the defendant, while Section 23 (a) might have been regarded as intended to limit the extensive jurisdiction employed by the circuit courts under the Bankruptcy Act of 1867 to actions by the trustee which the bankrupt himself could have brought in the circuit court."

Thus, not only did the *Schumacher* opinion fall into an understandable error concerning the Act of 1867 but its discussion thereof was entirely dictum. That case did not involve Chapter X or even Section 77B, and Section 23 was applicable there but not in the present case. Finally, as noted above, these dicta are contrary to the interpretation given to Sections 2 (a) (7) and 23 in a number of other decisions under the 1898 Act.

We submit, therefore, that the legislative and decisional setting, in the light of which Section 2 (a) (7) was incorporated into Section 102, is thoroughly consistent with the determination below that Congress, in making Section 23 inapplicable to Chapter X, intended to expand, rather than narrow, the choice of forum of corporate reorganization trustees. This position is in accord with the remedial purposes of Chapter X and the specific legislative history of the applicable sections of the Act.

The court below found jurisdiction in the district court for the present action within the four corners of the Bankruptcy Act and did not reach the question as to whether such jurisdiction was derivable from Section 24 of the Judicial Code. In view of our position that jurisdiction is conferred by the Bankruptcy Act itself, and because respondents give full treatment to the Judicial Code aspects of the case, we do not discuss the latter question here.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 850.—October Term, 1946.

Harrison Williams, Clifford F. Stone, Sidney J. Weinberg, et al., Petitioners, v. Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 16, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

Section 2 (a) of the Bankruptcy Act [1] confers upon all bankruptcy courts "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to . . . (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . ." The exception has reference to § 23 (b), which requires that "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67 and 70 of this Act." [2] Congress, however, in the Chandler Act of 1938

[1] The Chandler Act of 1938, 52 Stat. 840, generally revised the Bankruptcy Act of 1898, 30 Stat. 544, as amended. Section 2 in its original form was substantially as set out in the text except that jurisdiction was conferred "in bankruptcy proceedings," instead of "in proceedings under this Act." The change in language was made in 1938.

[2] Section 23 in full provides as follows: "JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between

declared the inapplicability of § 23 in reorganization proceedings under Chapter X; and it is upon the significance of this action to the jurisdiction of the federal courts that this case turns.[3]

Respondents were appointed trustees for the Central States Electric Corporation, a Virginia Corporation in reorganization in the District Court of the United States for the Eastern District of Virginia. Following an investigation under § 167[4] of the Act, respondents were authorized to institute suit against petitioners, who are past and present officers and directors of the debtor and others having connection therewith. This suit was then

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receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

Section 23 (a), as originally enacted, related to the circuit courts, which were abolished in 1911 by § 289 of the Judicial Code. 36 Stat. 1167. Formal amendment to § 23 (a) was made in 1926. 44 Stat. 664.

[3] Chapter X, containing the reorganization provisions, superseded § 77B. Section 102 of Chapter X provides: "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter."

[4] The investigation was made pursuant to the decision in *Committee for Holders, etc.* v. *Kent*, 143 F. 2d 684 (1944).

filed against petitioners in the District Court of the United States for the Southern District of New York, alleging a conspiracy to misappropriate corporate assets and asking an accounting and other relief. There was no allegation of diversity and jurisdiction was rested upon "the Constitution of the United States (Article I, Section 8, Clause 4, and Article III, Section 2), the Act of Congress relating to Bankruptcies (U. S. Code Title 11), and . . . the provisions of Section 24 (1), (19) of the Judicial Code . . ."

The District Court dismissed for lack of jurisdiction;[5] but the Circuit Court of Appeals reversed, holding that since the governing provisions of § 23, to which the "except" clause of § 2 (a) (7) refers, were suspended in Chapter X proceedings, jurisdiction to hear this plenary suit could be rested upon the general language of § 2. Other alleged grounds for jurisdiction were not considered. 159 F. 2d 67 (1946).

1. Petitioners construe "proceedings under this Act," within which the jurisdictional grant contained in § 2 is confined, as extending only to matters proper for summary disposition,[6] and interpret the suspension of § 23 in Chapter X cases, without providing a substitute therefore, as removing from the Act an affirmative grant to federal courts of jurisdiction to hear plenary suits, rather than as an action aimed at expanding that jurisdiction.[7] But

[5] Petitioners also based their motion to dismiss on the applicable statute of limitations, but the District Court indicated that if there had been jurisdiction to proceed, the motion to dismiss would otherwise have been denied, because of factual issues which first required determination.

[6] "Proceedings under this chapter," referred to in §§ 101 and 102 of Chapter X, is similarly construed.

[7] According to this view there would, in Chapter X cases, be no provisions in the Bankruptcy Act conferring jurisdiction upon federal courts to hear plenary suits other than in §§ 60, 67, and 70. A reorganization trustee would be left, where he could, to take advantage of the ordinary grounds for federal jurisdiction.

these views rest, in the main, upon what we think is an erroneous appraisal of the history of §§ 2 and 23.

Section 2 is substantially identical with § 1 of the Bankruptcy Act of 1867.[8] *Babbitt* v. *Dutcher*, 216 U. S. 102, 107 (1910); and cases dealing with that Act, while recognizing that certain suits brought by bankruptcy assignees should proceed in plenary, rather than summary, fashion, held that § 1 gave jurisdiction to the bankruptcy courts to proceed in both ways.[9] And although certain aspects of a bankruptcy proceeding could be handled only by the court in which the adjudication was had, § 1 conferred upon all bankuptcy courts jurisdiction to hear plenary suits brought by bankruptcy assignees against adverse claimants or against debtors of the bankrupt.[10]

Lathrop v. *Drake*, 91 U. S. 516 (1875), viewed the jurisdiction of the district courts in this manner and, we think, contrary to the statements later made in *Bardes* v. *Hawarden Bank*, 178 U. S. 524 (1900), and *Schumacher* v. *Beeler*, 293 U. S. 367 (1934), upon which petitioners rely, considered the jurisdiction of the district courts over plenary suits to rest upon § 1 of the 1867 Act.[11]

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[8] 14 Stat. 517. Section 1 gave the bankruptcy courts original jurisdiction "in all matters and proceedings in bankruptcy" which extended "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt . . ."

[9] *Sherman* v. *Bingham*, 21 Fed. Cas. 1270, No. 12,762 (1872); *Goodall* v. *Tuttle*, 10 Fed. Cas. 579, No. 5,533 (1872). The requirement of plenary proceedings, though not expressly appearing in the Act, was well recognized. *Marshall* v. *Knox*, 16 Wall. 551 (1872); *Smith* v. *Mason*, 14 Wall. 419 (1871).

[10] *Sherman* v. *Bingham*, 21 Fed. Cas. 1270, No. 12,762 (1872); *Goodall* v. *Tuttle*, 10 Fed. Cas. 579, No. 5,533 (1872).

[11] The references to the Act contained in the discussion of the jurisdiction of the district courts obviously referred to § 1; and *Sherman* v. *Bingham*, 21 Fed. Cas. 1270, No. 12,762 (1872), which expressly based upon § 1 the jurisdiction of the district courts to hear plenary suits,

Section 2 of the Bankruptcy Act of 1898 substantially repeated the broad grant of jurisdiction contained in § 1 of the 1867 Act. The bankruptcy courts were given "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy pro-

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was cited with unreserved approval. The pertinent passage in the *Lathrop* case is as follows:

"'The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the two general classes before mentioned. . . . Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. . . . But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the Act. The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman* v. *Bingham*, 7 Bank. Reg. 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy." 91 U. S. 516, 517–18.

ceedings . . ." [12] But § 2 (7), while granting to all bankruptcy courts jurisdiction to collect and to hear controversies relating to the estate of the bankrupt, appended the words "except as herein otherwise provided." The exception had reference to § 23,[13] which, in the clause applicable to the district courts, provided that, unless by the consent of the defendant, suits by the bankruptcy trustee should be brought only in the courts where the bankrupt might have brought them if bankruptcy proceedings had not been instituted. In sharp contrast to the broad language of § 2 (7) and to the practice under the 1867 Act,[14] § 23, in the interest of litigants and witnesses, deliberately directed to the state courts most of a bankruptcy trustee's plenary suits.[15]

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[12] Section 2 created the courts of bankruptcy and invested them "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to . . . (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

[13] *First Nat. Bank* v. *Title and Trust Co.*, 198 U. S. 280, 289 (1905); *Bryan* v. *Bernheimer*, 181 U. S. 189, 194 (1901); *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 535 (1900). Section 23 (b), as originally enacted, provided: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

[14] "A construction of the statute of 1898 which would deprive the federal courts of jurisdiction of the suits in question [trustee's suit to recover property] would make the act of 1898 unprecedented among bankrupt acts." *In re Hammond*, 98 F. 845, 853 (1899).

[15] When S. 1035, which eventually became the Act of 1898, reached the House, the judiciary committee recommended striking out all after the enacting clause and substituting the committee's own bill. Section 23 of the House version, 31 Cong. Rec. 1781 (1898), survived both debate and conference action and became § 23 of the Act of 1898. In

Some lower federal courts, however, immediately held that § 23 did not apply to suits brought to recover certain transfers of the bankrupt's property and, relying upon § 2, upheld the jurisdiction of federal courts.[16] *Bardes* v. *Hawarden Bank, supra*, checked this trend and gave full scope to the language of § 23. Suits to recover fraudulent transfers, like other plenary suits, were to be tried in the state courts. It was in the *Bardes* case unnecessary to explore the scope of § 2; for whatever the grant of jurisdiction there made, the interpretation given § 23 would have required the result reached. In any event, the construction of § 2, standing alone and without regard for the influence of § 23, as being confined to summary matters rested to a great extent upon a reading of *Lathrop* v. *Drake, supra*, with which, as has been indicated, we cannot agree.

Congressional reaction to the *Bardes* case was almost immediate. Wishing to allow the trustee to resort to federal courts in recovering fraudulent transfers and preferences, Congress in 1903 created exceptions to § 23 in favor

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reviewing the bill preliminary to debate, the chairman of the House judiciary committee explained:

"The jurisdiction of State courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered with.

"Suits by the trustee shall only be brought in the courts where the bankrupt might have brought them except for the misfortune of his bankruptcy, unless by the consent of the proposed defendant.

"Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was great inconvenience and much expense to a majority of the people interested in such litigation as principals, witnesses, and attorneys. Such will not be the effect under this bill. It is proper that such should not be the case, speaking generally, in behalf of the administration of justice." 31 Cong. Rec. 1785 (1898).

[16] *In re Woodbury*, 98 Fed. 833 (1900); *In re Hammond*, 98 Fed. 845 (1899); *Louisville Trust Co.* v. *Marx*, 98 Fed. 456 (1899).

of suits brought under §§ 60 (b) and 67 (e);[17] and, being doubly cautious, Congress also inserted in §§ 60 (b) and 67 (e) clauses giving any bankruptcy court jurisdiction to hear plenary suits brought under those sections.[18] It was explained at the time by the House judiciary committee that § 2 (7) would probably have been ample basis for the jurisdiction of the bankruptcy courts, and that it was only to remove all doubt that §§ 60 (b) and 67 (e) had also been amended.[19]

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[17] 32 Stat. 798–9.

[18] *Id* at 799–800. Congress likewise amended § 70 (e), but by an oversight the exceptions made to § 23 were not correspondingly extended. The omission was corrected in 1910. 36 Stat. 840. See H. Rep. No. 511, 61st Cong., 2d Sess. 6 (1910).

[19] "Section 9: Under the law of 1867, the Federal and State courts had concurrent jurisdiction of suits to recover property fraudulently or preferentially transferred. *Bardes* v. *Bank of Hawarden* (Ia.), 178 U. S., 524, has so construed section 23 b, of the law as to deny such jurisdiction to the district courts, save with the consent of the proposed defendant. In commercial centers this amounts to a denial of justice, the calendars of the State courts being years behindhand; while, growing out of *Bardes* v. *Bank*, have come decisions which have crippled the administration of the law to a marked degree. (See in re *Ward* (Mass.), 5 Am. B. R., 215; *Mueller* v. *Nugent* (Ky.), 105 Fed., 581; this latter, however, recently reversed by the Supreme Court.) There is a very general demand for a return to the policy of the law of 1867. *Were it not for section 23b, section 2 (7), would probably confer ample jurisdiction on the district courts.* The change in section 23, b, proposed by the bill simply excepts from the operation of it all suits which can, under the specific words of the law, be brought to recover property, and this merely by referring to the three sections under which alone such suits can be brought. *To remove all doubt*, also, sections 13 and 16 of the bill confer concurrent jurisdiction of all such suits on the State courts and the Federal district courts, by adding appropriate words to each of the three sections, section 60 b, section 67 e, and section 70 e." H. Rep. No. 1698, 57th Cong., 1st Sess. 7 (1902). (Italics added.)

Substantially the same explanation was given on the floor of the

Where §§ 60 (b), 67 (e), and 70 (e) were not involved, the *Bardes* rule continued to be applied where plenary proceedings were required, as in cases relating to property adversely held[20] and suits upon choses in action belonging to the bankrupt's estate.[21] Left for summary disposition under § 2 were those proceedings in which the controversy related to property in the possession or constructive possession of the court or to property held by those asserting no truly adverse claim.[22]

From its inception § 23 contained a clause seemingly mitigating the rigors of the jurisdictional requirements imposed. A trustee, "unless by consent of the proposed defendant," could bring suit only in courts where the bankrupt could have sued. Subsequent to the *Bardes* case some lower federal courts held that even with the consent of a defendant, some independent ground for federal juris-

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House by Representative George W. Ray, chairman of the judiciary committee. 35 Cong. Rec. 6941, 6942 (1902).

Representative Ray, we note, was second ranking member of the judiciary committee at the time of the passage of the 1898 Act. It was that committee which drafted §§ 2 and 23 in substantially the form appearing in the 1898 Act. See note 15, *supra*. Representative Ray was also a member of the House conference committee, and it was in conference that the Act of 1898 was finally drafted and the serious differences between the House and Senate were resolved.

[20] *Harris* v. *First Nat. Bank*, 216 U. S. 382 (1910).

[21] *Kelley* v. *Gill*, 245 U. S. 116 (1917); *In re Roman*, 23 F. 2d 556 (1928); *Lynch* v. *Bronson*, 177 F. 605 (1910).

[22] *Whitney* v. *Wenman*, 198 U. S. 539 (1905); *Mueller* v. *Nugent*, 184 U. S. 1 (1902); *Bryan* v. *Bernheimer*, 181 U. S. 189 (1901); *White* v. *Schloerb*, 178 U. S. 542 (1900). "But in no case where it lacked possession, could the bankruptcy court . . . adjudicate in a summary proceeding the validity of a substantial adverse claim. In the absence of possession, there was under the Bankruptcy Act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit." *Taubel, etc., Co.* v. *Fox*, 264 U. S. 426, 433–34 (1924).

diction must be present.[23] The conflict was resolved in *Schumacher* v. *Beeler, supra*. It was held that in § 23 Congress had exercised its bankruptcy powers to confer upon federal courts jurisdiction conditioned upon a defendant's consent [24] and that, given consent, no independent ground for federal jurisdiction was required. The case turned upon the meaning of the consent clause in § 23. The remarks offered concerning § 2 were unnecessary and, in any event, were based upon the similar statements made in *Bardes* v. *Hawarden Bank, supra*.

The *Beeler* decision, like that in the *Bardes* case, does not direct a conclusion that § 2, in the absence of § 23, confers only a summary jurisdiction; for it was because of the limitations of § 23 that plenary suits had been excluded from the otherwise broad scope of § 2.[25] Cases construing

[23] *Matthew* v. *Coppin*, 32 F. 2d 100, 101 (1929); *see Stiefel* v. *14th Street Realty Corp.*, 48 F. 2d 1041, 1043 (1931); *Coyle* v. *Duncan Spangler Coal Co.*, 288 F. 897, 901 (1923); *Piano Co.* v. *First Wisconsin Trust Co.*, 283 F. 904, 906 (1922); *De Friece* v. *Bryant*, 232 F. 233, 236 (1916); *McEldowney* v. *Card*, 193 F. 475, 479 (1911). Contra: *Beeler* v. *Schumacher*, 71 F. 2d 831 (1934); *Toledo Fence Post Co.* v. *Lyons*, 290 F. 637, 645 (1923).

[24] "The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. . . . Exercising that power, the Congress prescribed in § 23b the condition of consent on the part of the defendant sued by the trustee." *Schumacher* v. *Beeler*, 293 U. S. 367, 374 (1934).

[25] The cases decided under the 1867 Act and referred to in notes 10–11, *supra*, recognized the broad scope of language similar to that of § 2; and cases arising under the 1898 Act and decided before *Bardes* v. *Hawarden Bank*, 178 U. S. 524 (1900), based upon § 2 the jurisdiction of the federal courts to entertain plenary suits to recover property adversely held. See note 16, *supra*.

Later cases have recognized the overriding consequence of § 23. "Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, ex-

the latter in the presence of the overriding prohibitions of § 23 are not persuasive in a situation where, for the first time, § 23 has been declared inoperative.

2. To accept petitioner's reading of § 2 would produce consequences affording peculiar explanations for the express elimination of § 23 in Chapter X cases. For one thing, there would be destroyed the consent basis for federal jurisdiction of plenary suits brought by a trustee;[26] and, for another, diversity jurisdiction would depend upon the citizenship of the trustee rather than upon that of the debtor. The latter is a formal change of no obvious value, and the former puts a greater limitation upon the jurisdiction of a Chapter X court than has been placed upon an equity receivership, 77B, or ordinary bankruptcy court, a result in obvious contrast to discernible trends in reorganization law.

The committee reports and Congressional debates do not elaborate upon the decision to eliminate § 23,[27] and the

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cept as herein otherwise provided.' But, § 23-b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened." *Kelley* v. *Gill*, 245 U. S. 116, 119 (1917). "There is plainly a controversy in relation to the estate of a bankrupt, and subdivision 7 of section 2 would confer jurisdiction if it were not for the limiting words, 'except as herein otherwise provided.'" *Lynch* v. *Bronson*, 160 F. 139, 140 (1908). See also *Lowenstein* v. *Reikes*, 54 F. 2d 481, 485 (1931) (dissenting opinion), and the analysis of the interplay of §§ 2 and 23 in Rea, *Federal Jurisdiction in Suits by Trustees in Bankruptcy*, 20 Ill. L. Rev. 565 (1935), which was written after the *Beeler* decision.

[26] *Schumacher* v. *Beeler*, 293 U. S. 367 (1934). See p. 10 and note 24, *supra*. In *Tilton* v. *Model Taxi Corp.*, 112 F. 2d 86 (1940), a 77B case, the jurisdiction of the district court to entertain a plenary suit was based upon consent.

[27] The Senate report said in regard to the committee's suggested amendments to § 102: "The proposed amendment amplifies the provision with reference to applicability so as to leave no doubt that the provisions of Chapters I to VII are alone to be deemed applicable,

hearings reveal only that § 23 was one of several sections which the National Bankruptcy Conference desired to eliminate, and which might be held applicable if not expressly deleted.[28] However, the action occurred in the

except where inconsistent or in conflict with the provisions of the chapter." S. Rep. No. 1916, 75th Cong., 3d Sess. 6 (1938).

The amendments to § 102 were agreed to without comment on the floor of the Senate, and were similarly accepted by the House. 83 Cong. Rec. 8697, 9103, 9107, 9110 (1938).

[28] The recommendation was made by Mr. John Gerdes. See Hearings before Subcommittee of the Committee on the Judiciary, U. S. Senate, on H. R. 8046, 75th Cong., 2d Sess. 77 (1938). Mr. Gerdes did not at this time explain the reasons for the suggested suspension of § 23. He stated as follows:

"Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in corporate reorganizations—where secured as well as unsecured claims are dealt with—would cause great confusion. To make it clear that section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. The priorities under chapter X would therefore be those used in equity receiverships. That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B.

"In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

A representative of the Association of the Bar of the City of New York also listed § 23 among those sections which "have no applicability

process of developing a workable reorganization technique and should be viewed in that context. While an equity receivership court had dependent jurisdiction, regardless of diversity or other independent grounds for federal jurisdiction, to hear plenary suits related to the estate of the debtor,[29] under § 77B, which made reorganization of non-railroad corporations a part of the bankruptcy scheme, it was believed in some quarters that § 23 would have its traditional effect upon the jurisdiction of federal courts to hear plenary suits, even though the reorganization court was given the "powers" of an equity receivership court.[30] Other commentators, thinking that § 77B should not provide a less efficient procedure than the equity receivership, considered § 23 inapplicable to 77B cases and regarded the reorganization courts as having jurisdiction to hear plenary suits.[31] The controversy had not been settled when Congressional committees were considering the bill which became the Chandler Act of 1938, and such a background for the suspension of § 23 in Chapter X cases obviously raises no inference of a desire to restrict, rather than to expand, the jurisdiction of the federal courts.

To interpret the elimination of § 23 in Chapter X cases as restricting the access of the trustee to the federal courts would not be in harmony with other provisions contem-

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to a reorganization procedure." *Id.* at 37. And the spokesman for the Philadelphia Court Plan Committee suggested amending § 23 to give ordinary bankruptcy courts more effective powers to deal with fraudulently transferred or concealed assets. *Id.* at 26.

[29] *White* v. *Ewing*, 159 U. S. 36 (1895); see *Riehle* v. *Margolies*, 279 U. S. 218, 223 (1929).

[30] Finletter, Principles of Corporate Reorganization 185–87 (1937).

[31] 2 Gerdes, Corporate Reorganizations 1465 (1936). The courts had not been squarely faced with the problem at the time Congress was considering the 1938 revision of the Bankruptcy Act. *Matter of United Sportswear Co.*, 28 Am. B. R. (N. S.) 456 (1935), had suggested that § 23 was applicable, while the contrary intimation is evident in *Thomas* v. *Winslow*, 11 F. Supp. 839 (1935). See also Note, 49 Harv. L. Rev. 797 (1936).

poraneously written into Chapter X and defining anew the position and functions of the reorganization trustee. The appointment of a disinterested trustee was made mandatory in appropriate cases,[32] his qualifications were prescribed,[33] and upon him were devolved functions aimed at eliminating the abuses of previous reorganization schemes.[34] It was his duty to prepare the reorganization plan,[35] and there were conferred upon him investigative powers and duties [36] which not only contemplated the discovery of wrongs done the debtor by its former management, but also insured the "prosecution of all causes of action" which might "add to the assets of corporations in reorganization." [37] These provisions were "of paramount importance in the revision of § 77B," [38] and are hardly indicative of a Congressional desire to restrict the trustee's choice of a forum in which to litigate plenary suits. On

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[32] § 156. The requirement of a disinterested trustee was one of the major substantive additions which Chapter X made to § 77B. S. Rep. No. 1916, 75th Cong., 1st Sess. 19 (1938).

[33] §§ 156 and 158.

[34] The important defects of 77B reorganizations and the remedy provided in Chapter X are analyzed in S. Rep. No. 2084, 75th Cong., 3d Sess. 1-3 (1938).

[35] §§ 167 (6) and 169.

[36] Section 167 in part provides: "The trustee upon his appointment and qualification—

"(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

"(2) may, if the judge shall so direct, examine the directors and officers of the debtor and other witnesses concerning the foregoing matters or any of them;

"(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate."

[37] S. Rep. No. 1916, 75th Cong., 3d Sess. 29 (1938).

[38] *Ibid.*

the contrary, the conclusion more in accord with the purposes of Chapter X and with the pivotal position in which the trustee was placed [39] is that Congress intended by the elimination of § 23 to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking.

The decision of the Circuit Court of Appeals is in entire harmony with the foregoing considerations. The language of § 2, in its ordinary sense and no longer limited by § 23, easily comprehends the present type of suit; and so to hold directly and effectively subserves Congressional desires as revealed in the plain policy of Chapter X and in the express elimination of § 23, which has, since its enactment in 1898, been viewed as a sharp restriction upon the jurisdiction theretofore exercised by bankruptcy courts and as a strong preference for state courts.[40] Since all reorganization courts are the objects of the jurisdiction conferred by § 2,[41] the District Court for the Southern Dis-

[39] "These functions of the trustee appointed in the larger cases are difficult to overemphasize . . . Investors must be afforded a 'focal point' for reorganization." H. Rep. No. 1409, 75th Cong., 1st Sess. 43 (1937).

[40] "The Bankruptcy Act of 1898, in respect to the matters now under consideration, was a radical departure from the act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankruptcy courts, and to preserve, to a greater extent than the former act, the jurisdiction of the state courts over actions which were not distinctly matters and proceedings in bankruptcy." *Bush* v. *Elliott*, 202 U. S. 477, 479–80. (1906). And see pp. 6 and 7, notes 14–15, *supra*.

[41] Section 1 (10) defines the courts of bankruptcy as follows: "'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, and the District Court of the United States for the District of Columbia"; *Babbitt* v. *Dutcher*, 216 U. S. 102 (1910). And see § 2 (a). (20) of the Bankruptcy Act.

trict of New York has jurisdiction to hear the present suit, which is brought by reorganization trustees and which charges misappropriation of the assets of a Chapter X debtor.[42] "This seems to be the only logical conclusion to be derived from the fact that § 23 has no application under Chapter X." [43]

3. Respondents in the alternative argue that the equity receivership powers conferred by § 115 [44] include jurisdiction to hear plenary suits and that all reorganization courts may exercise the jurisdiction so conferred. Peti-

[42] Our conclusion is not changed by the language of § 23 (a), which as drawn in 1898, 30 Stat. 544, 552, was designed to grant a limited jurisdiction to circuit courts over "controversies at law and in equity," as distinguished from "proceedings in bankruptcy," and which seems only to have recognized the rule existing under the 1867 Act that certain bankruptcy matters were the exclusive concern of the bankruptcy court. If "proceedings" as used in § 23 (a) denoted those instances in which summary jurisdiction was proper, to find that "proceedings" in § 2 has no such precise meaning simply exemplifies the variety of ways in which "proceedings" has been employed in the bankruptcy statute. Section 11 (e) authorizes trustees to institute "proceedings in behalf of the estate upon any claim" and refers to "any proceeding, judicial or otherwise." And § 60 (b), 67 (e) and 70 (e) speak of "proceedings" in connection with plenary. In Chapter X itself, §§ 101 and 102 refer to "proceedings under this chapter." This term must extend to plenary suits, for otherwise § 23, which deals only with plenary suits, would not be suspended at all. Significant too is that "bankruptcy proceedings" in § 2 was in 1938 changed to "proceedings under this Act" in order that the jurisdiction granted by § 2 would extend to "proceedings" under the new debtor relief chapters, including Chapter X.

[43] 6 Collier on Bankruptcy 673 (14th ed. 1947).

[44] Section 115 provides: "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provision of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

tioners would, in any event, confine the effects of § 115 to the reorganization court in which the reorganization petition has been approved. We need not pass on these contentions; for, assuming that § 115 is jurisdictional [45] and that it extends only to the primary court, jurisdiction in the present case may still be rested upon § 2. That section, in the absence of § 23, supports the jurisdiction of all district courts to hear plenary suits brought by a reorganization trustee, a result consistent with the aims of Chapter X and with the elimination of a section which is itself applicable to all district courts. Congress could have carved out of § 23 only a narrow exception in favor of the court in which the reorganization proceedings are pending and thereby left unchanged the jurisdiction of other courts over a trustee's plenary suits. Limited exceptions are familiar in the history of § 23. But Congress went further and eliminated § 23 entirely in Chapter X proceedings. Because of the countrywide ramifications of corporate debtors placed in Chapter X reorganization, it is as usual as not for the trustee to resort to foreign jurisdictions for the disposition of plenary suits. Allowing the primary court to hear these suits will not change

[45] The similar "powers" provision in § 77B has been viewed as non-jurisdictional. *In re Standard Gas & Electric Co.*, 119 F. 2d 958, 962 (1941); see *In re Prima*, 98 F. 2d 952, 958 (1938). These cases were decided after the passage of the Chandler Act and considered § 23 fully applicable in pending 77B proceedings. In *Tilton* v. *Model Taxi Corp.*, 112 F. 2d 86 (1940), § 23 was considered applicable in § 77B proceedings so as to permit jurisdiction of the district court to be based upon a defendant's consent. And see *Thompson* v. *Terminal Shares*, 104 F. 2d 1 (1939), for a treatment of a similar provision contained in § 77. On the other hand, § 115 has been interpreted as jurisdictional. *In re Cuyahoga Finance Co.*, 136 F. 2d 18 (1943); see *Warder* v. *Brady*, 115 F. 2d 89, 93-94 (1940). Other courts have thought the suspension of § 23 in Chapter X cases would give the reorganization court jurisdiction to hear plenary suits. See *Clarke* v. *Fitch*, CCH Bankr. Law Ser. ¶ 53,805 (1942); *Tilton* v. *Model Taxi Corp.*, *supra* at 88.

this situation, if it is true that the process of a reorganization court does not run nationwide in plenary cases.[46] Congressional policy would receive only limited recognition if the suspension of § 23 is interpreted as allowing the trustee access to only the appointing court and as restricting his access to all other district courts.[47]

4. Our holding is, of course, that Congress in 1938 extended the jurisdiction of the reorganization courts beyond that exercised by ordinary bankruptcy courts. Section 2 of the 1898 Act contained the broad language borrowed from § 1 of the Act of 1867. But the exception to § 2 (a) (7) acknowledged the overriding limitations of § 23, which was the embodiment of Congressional policy to exclude from the bankruptcy courts many of the trustee's plenary suits. That same meaningful section was expressly eliminated in 1938 in the process of perfecting a chapter of the Bankruptcy Act dealing with the distinctive and special proceedings in corporate reorganization. *Cf. Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648, 676 (1935). This negation of long-standing policy

[46] It has been so held. *In re Standard Gas and Electric Co.*, 119 F. 2d 658 (1941); *Bovay* v. *H. M. Byllesby & Co.*, 88 F. 2d 990 (1937); *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. 2d 363 (1936); *Clarke* v. *Fitch*, CCH Bankr. Law Ser. ¶ 53,805 (1942).

[47] The Chapter X cases cited in note 45, *supra*, did not reach the question of whether courts other than the primary court would have jurisdiction to hear plenary suits where the latter had jurisdiction of such a suit but could not exercise it because of personal service or venue difficulties. Nor did Mr. Gerdes, who construed the suspension of § 23 as establishing, by way of § 115, the jurisdiction of the reorganization court to hear plenary suits. Gerdes, *Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act*, 52 Harv. L. Rev. 1, 21 (1938). But it was his opinion even under § 77B, where the applicability of § 23 was left in doubt, that all reorganization courts, not just the domiciliary court, had jurisdiction to hear plenary suits brought by the trustee, even though the usual grounds for federal jurisdiction were lacking. 2 Gerdes, Corporate Reorganizations 1480, 1513–14, 1525–26 (1936).

should be given effect consistent with the aims of Chapter X and should not be hedged by judge-made principles not in accord with those aims. Congress need not document its specific actions in elaborate fashion in order to direct this Court's attention to statutory policy and purpose. The failure to provide appropriate fanfare for the suspension of § 23 in Chapter X cases, and for the consequent expansion of federal jurisdiction, hardly invites our opinion as to the advisability of the action which Congress has taken. Judicial drives to limit the jurisdiction of federal courts should not lead to decision falling short of complete effectuation of statutory scheme. With the limitations of § 23 suspended, § 2 confers jurisdiction upon all reorganization courts to hear plenary suits brought by a Chapter X trustee.

5. Petitioners insist that certain consequences, which they term undesirable, will flow from this decision. It is said, for example, that the state courts will automatically be deprived of jurisdiction to hear a trustee's plenary suits. But whether or not this and other suggested consequences will follow we leave for consideration in cases presenting such issues for decision.

The decision of the Circuit Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 850.—October Term, 1946.

Harrison Williams, Clifford F. Stone, Sidney J. Weinberg, et al., Petitioners, *v.* Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 16, 1947.]

Mr. Justice Frankfurter, whom Mr. Justice Jackson joins, dissenting.

On the surface this appears to be merely a bankruptcy case raising technical questions of federal jurisdiction. But the answers to these questions have far-reaching import. They involve the distribution of judicial power as between United States and State courts, and thus concern federal-state relations generally. More immediately, inasmuch as the allowable scope of the business of the federal courts is in controversy, a proper disposition of the case bears upon the quality of the work of those courts and of this Court in particular.

The Court makes a shift in the distribution of judicial power between State and federal courts which has prevailed for half a century. Such a break with the past is not required by what Congress has written nor by any inference drawn from disclosed Congressional policies. On the contrary, I believe that the result reached is repelled by every consideration relevant to the proper construction of the statutory materials by which the jurisdiction of the federal courts is to be determined.

In 1867 Congress granted jurisdiction to the then lower federal courts over suits on claims owing to one whose estate was administered in bankruptcy, though the claims

were based wholly on local law and were devoid of any federal aspect which would give a federal court jurisdiction were the creditor not in bankruptcy. This was another one of those enactments of the Reconstruction period when the influences toward expansion of federal jurisdiction were at flood-tide. As part of the recession from this Reconstruction tendency Congress, in the Bankruptcy Act of 1898, withdrew from the federal courts suits that rested solely on local law even though they involved claims asserted on behalf of one whose estate was being administered in the bankruptcy court. By a tenuous process of implication the Court now concludes that Congress, through the Chandler Act of 1938, enlarged federal jurisdiction in one aspect of the bankruptcy law, though neither the terms of the legislation, nor its context, nor its legislative history, nor considerations of policy heretofore suggested, call for such construction, while the history and structure of the legislation, its judicial interpretation, regard for congruity in finding meaning, and the larger claims of the federal judicial system, support a different reading of the statute. The large assumptions of the decision are that by indirection and without manifested design Congress reversed its prevailing policy of limiting federal jurisdiction and preserving a proper balance between federal and State courts; that Congress deviated from a principle of our federalism especially respected in recent times, according to which claims arising under State law shall be tried under local trial procedure in the local courts; that Congress has departed from a settled policy of fifty years uniformly applicable in bankruptcy proceedings and which now continues as to all other proceedings in bankruptcy, although this established policy of leaving local claims to the State courts does not at all interfere with those aims for effective reorganization through use of the bankruptcy power which gave rise to Chapter X.

1. The facts in this case are not in dispute. The Central States Electric Corporation filed in the District Court

for the Eastern District of Virginia a voluntary petition for reorganization under Chapter X of the Bankruptcy Act. With the consent of the reorganization court, respondents, as trustees, brought this suit in the District Court for the Southern District of New York on behalf of the Corporation for an accounting and damages against its officers and directors for alleged fraud and mismanagement. The District Court found want of jurisdiction, but was reversed by the Circuit Court of Appeals for the Second Circuit. 159 F. 2d 67. This Court now affirms the Circuit Court of Appeals and holds that a Chapter X trustee may bring this plenary suit *in personam* in a federal district court not the reorganization court, although neither diversity of citizenship nor other ground of federal jurisdiction exists.

No doubt Congress could authorize such a suit. See *Schumacher* v. *Beeler*, 293 U. S. 367, 374. Nor is there any doubt that Congress has not conferred upon the district courts the power to entertain such a suit by an ordinary bankruptcy trustee. Section 23 of the Bankruptcy Act specifically limits plenary jurisdiction to a few enumerated cases (of which this is not one), or where defendant consents. The Court finds, however, that Congress, by making § 23 inapplicable to Chapter X proceedings, opened all the federal courts to plenary suits by a Chapter X trustee. To determine the significance of the inapplicability of § 23 to Chapter X proceedings it is necessary to consider the affiliations between the Bankruptcy Act of 1898 and the Chandler Act. That in turn makes it necessary to examine the Act of 1898 in relation to its predecessor, the Act of 1867. These three enactments—the Bankruptcy Act of 1867, the Bankruptcy Act of 1898, and the Bankruptcy Act of 1938—are an interrelated process of legislation. The role of § 23 cannot be properly assessed merely by a textual reading, or by ascertaining its presence or absence in these three Acts. It must be placed in the context of the history of the Act

of 1867 and of the Act of 1898, and the relation of that history to the aims of the Chandler Act.

2. To understand the full import of the Act of 1867, so far as now relevant, it will bear repetition that it reflected the expansionist trend in federal jurisdiction after the Civil War. Statute after statute gave to the federal courts jurisdiction over cases which had previously been left entirely to State tribunals, and this Court gave a broad construction to such statutes. The Bankruptcy Act of 1867 gave to all district and circuit courts concurrent jurisdiction over suits "by the assignee in bankruptcy against any person claiming an adverse interest" in the estate. Section 2 of the Act of March 2, 1867, 14 Stat. 517, 518. This provision was construed in *Lathrop* v. *Drake*, 91 U. S. 516. Mr. Justice Bradley, with characteristic clarity, distinguished between "jurisdiction as a court of bankruptcy over the proceedings in bankruptcy . . . [and] jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." 91 U. S. at 517. But the terms of the Act were read to confer the latter jurisdiction on the lower federal courts. It is worth noting that Mr. Justice Bradley was a well-known exponent of expansive federal jurisdiction. See, *e. g.*, his dissenting opinion in *Murdock* v. *Memphis*, 20 Wall. 590, 639.

3. The business which this broad construction of the Act of 1867 brought to the federal courts, together with that from other sources, led to the overburdening of their dockets, and inevitably of the dockets of this Court, and gave rise to the various movements for their relief. The history of the federal courts is to a considerable measure a history of the rise and fall of the scope of the jurisdiction given to them by Congress. Not to take account of these underlying factors in the construction of judiciary acts is to leave out the meaning in the interstices of the words

of enactments. The Act of 1898 explicitly reveals the important shift in emphasis that had taken place within thirty years in the distribution between State and federal courts of the judicial power at the disposal of Congress. By 1898 the expansionist trend in federal jurisdiction had receded. The movement was toward a curtailment for an overburdened judiciary. The new Bankruptcy Act also showed the recession.

The Act of 1898 was not an amendment of the Act of 1867. The latter had been repealed by the Act of June 7, 1878, 20 Stat. 99, and for twenty years there was no federal bankruptcy Act. Accordingly, the 1898 Act is not to be read as a modification of an existing system. It established a scheme of bankruptcy administration where there was none. Its framers, of course, drew on history. They borrowed heavily from the Act of 1867. But a comparison of the jurisdictional sections of the 1898 Act with those of its predecessor reveals the great change in the attitude of Congress regarding the withdrawal of essentially local litigation from the State courts.

4. The shift in jurisdictional direction was duly respected when the Act of 1898 first came here for construction. Speaking for a unanimous Court, Mr. Justice Gray pointed out the marked structural differences between the Act of 1898 and that of 1867. The latter granted summary jurisdiction to the district court in § 1; plenary jurisdiction was conferred by § 2 on district and circuit courts concurrently of "suits at law or in equity, between the assignee in bankruptcy and an adverse claimant." The Act of 1898 took over § 1 of the Act of 1867, and discarded § 2. Section 2 of the Act of 1898, derived from § 1 of the 1867 Act, confers only summary jurisdiction. Plenary jurisdiction was not conferred by the Act of 1898 on either the district or circuit courts except to the very limited extent granted by § 23.

Such was the construction of the Act of 1898 made almost contemporaneously with its enactment. *Bardes* v. *First National Bank of Hawarden*, 178 U. S. 524. This construction was reaffirmed thirty-four years later by a unanimous Court, speaking through Mr. Chief Justice Hughes. *Schumacher* v. *Beeler, supra.*

5. This recognition of the drastic difference between the two Acts was not drawn merely from the inert words of the statutes. The words expressed the great differences of outlook, to which reference has been made, in regard to the transfer to the federal courts of what is essentially State litigation. This Court found the accent of the Act of 1867 to be on enforcement through "national tribunals." The matter was put quite plainly by Mr. Justice Bradley. "The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise." *Lathrop* v. *Drake, supra*, at 518.

The outlook of the Act of 1898 as to proceedings not in bankruptcy "properly so called," *Bardes* v. *First National Bank of Hawarden*, 178 U. S. 524, 533, was precisely the opposite. The emphasis was not on uniform enforcement through "national tribunals." Concern was with "the greater economy and convenience of litigants and witnesses" by leaving the determination of what intrinsically are merely local questions to the "local courts of the State." *Bardes* v. *First National Bank of Hawarden, supra*, at 538. The Court again referred to this purpose of the 1898 Act when it gave full reconsideration

to the legislation in *Schumacher* v. *Beeler, supra,* at 374. Emphasis was placed on the importance of ready accessibility to litigants afforded by local courts as against the inconvenience often entailed in bringing suitors to the federal courts, particularly in Western States. By reference to an earlier decision in which that consideration was treated as a controlling factor, the Court indicated a guiding principle in deciding questions of doubtful jurisdiction. See *Shoshone Mining Company* v. *Rutter,* 177 U. S. 505, 511, 513, cited in *Bardes* v. *First National Bank of Hawarden,* at 538.

6. But we are now told that the *Bardes* and *Schumacher* cases misconstrued the Act of 1898 and its relation to that of 1867. The opinions of Mr. Justice Gray and Mr. Chief Justice Hughes were, according to this view, the products of misreading of judicial history and of a faulty analysis of the Act of 1898.—Indeed, the foundation of the decision of the court below and of the argument at the bar of this Court is the claim that the construction placed upon the jurisdictional Act of 1898 by the *Bardes* and *Schumacher* cases was erroneous and to be rejected without compunction because, after all, merely the expression of erroneous *dicta.* Whether the discussion of the whole structure of an Act in order to find meaning for a particular part more immediately in litigation constitutes *dicta,* in the technical sense, is a nice exercise in legal dialectics. The fact of the matter is that it was rationally relevant to the problem calling for adjudication in the *Bardes* cases to consider comprehensively the relation of the Act of 1898 to that of 1867. The view that was taken had the strength that comes not only from a unanimous Court but one contemporaneous with the legislation under scrutiny. And when the construction so placed upon an Act is reaffirmed thirty-four years later by a Court particularly strong in Justices who had had extensive ex-

perience in commercial law, it seems pretty late in the day to suggest that such weighty constructions by this Court are now to be found wrong.[1] The court below was driven to this drastic undertaking. For if § 2 of the Act of 1898 is the source solely of summary proceedings in bankruptcy, and jurisdiction for plenary suits, to a limited extent, was granted solely by § 23, the elimination of § 23 for purposes of Chapter X cannot serve to put into § 2 a plenary jurisdiction which was never there.

7. To reexamine the ground covered in the *Bardes* and *Schumacher* cases would, as it seems to me, be a work of supererogation. And so I will content myself with some observations pertinent to a proper view of the Act of 1898 as an entirety. The different features of an organic statute are not discrete parts. They cast light upon each other and illumine the whole. The Act of 1898 was read as it was by this Court because it established a comprehensive bankruptcy scheme. Sections 2 and 23 were read in combination, for they drew a sharp line between "proceedings in bankruptcy" and plenary "suits at law or in equity." For fifty years it has been the policy of Congress that a bankruptcy trustee bringing an action like that before us should sue in a State court. (This, of course, includes a federal

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[1] In view of his extensive commercial experience on matters of bankruptcy, any observation by Mr. Justice Brandeis carries great weight. But neither in *Kelley* v. *Gill*, 245 U. S. 116, nor elsewhere, did he state that § 2 of the Bankruptcy Act was a grant of plenary jurisdiction to all the courts and that § 23 merely operated as a curtailment of such grant. What is significant is that when, in *Schumacher* v. *Beeler*, *supra*, upon a full dress consideration of the problem, a contrary analysis was made, Mr. Justice Brandeis joined in it.

In another bankruptcy case, this Court said: "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance." *Maynard* v. *Elliott*, 283 U. S. 273, 277.

court sitting in the State where there is diversity of citizenship. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Guaranty Trust Company* v. *York*, 326 U. S. 99.) Howsoever any section of the Act of 1898 might have been read had it existed by itself, on a view of the Act as an entirety it was settled that summary proceedings may be brought in any federal court, whereas plenary suits at law and in equity, distinguished as such from proceedings in bankruptcy, can be brought only where they could have been brought between the bankrupt and the opposing party had there been no bankruptcy. Section 2 had an intrinsically limited scope in its setting with § 23. The scope continues so limited and does not automatically expand because § 23 is *pro tanto* eliminated.

This jurisdictional differentiation was not a matter of Congressional whim or judicial technicality. It was easy for this Court to discern that the object of Congress "may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses." *Bardes* v. *First National Bank of Hawarden*, *supra*, at 538; *Schumacher* v. *Beeler*, *supra*, at 374. Congress saw good reason for not infringing on the ordinary jurisdiction of State courts where a suit is not really part of the bankruptcy proceedings. It chose to leave such litigation to the appropriate local practice and local rules concerning jury trial in the local court, and at the same time to relieve thereby an overworked federal judiciary.

8. These important considerations touching the interplay of State and federal courts as well as the effective administration of justice in the federal courts have not lost force with time. Congress has continued to recognize their validity. As to bankruptcy trustees generally, the Act of 1938 continues to require that local suits like the present be brought in local courts. And in preparing

for the Judiciary Committee of the House of Representatives an analysis of a predecessor bill introduced by Mr. Chandler, the National Bankruptcy Conference indicated that the considerations relevant to a proper distribution of business as between State and federal courts which underlay the restrictive policy of the Act of 1898 were more than ever applicable:

> "In *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, Mr. Justice Brandeis declared obiter that Congress had power to confer on a bankruptcy court jurisdiction to adjudicate the rights of trustees to property not in possession of the bankruptcy court, either actually or constructively, but adversely held by a third person; but that Congress had not as yet exercised that power, or conferred such jurisdiction under any of the provisions of the Bankruptcy Act.
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> "The proceedings of Congress prior to the enactment of the Bankruptcy Law of 1898 show that the exercise of that power was deliberately withheld, because of the fear of flooding the federal courts with a large volume of new litigation. That motive is even stronger today [1936] than it was in 1898, and for that reason we do not consider it wise to enlarge the jurisdiction at this time; except as indicated to include receivers and so-called 'debtor proceedings.'" (Analysis of H. R. 12889, 74th Cong., 2d Sess., Committee Print p. 134.)

The indicated exceptions do not touch the jurisdiction here asserted. Yet the Court now concludes that as to Chapter X trustees Congress implied an exception so as to allow the trustee to sue in any federal district court in the country. If this be so, I see no escape from the conclusion that not only have the federal courts jurisdiction but the State courts no longer have it. Consideration of so destructive a consequence ought not to be postponed as though it were not immediately relevant to

the proper construction of the legislation before us. If such suits are "bankruptcy proceedings"[2] within the jurisdictional grant of § 2—for it is necessary to find in some language an explicit grant of jurisdiction, and only § 2 is invoked—how can the bankruptcy aspect of the proceeding evaporate when it comes to "matters and proceedings in bankruptcy" as to which "The jurisdiction vested in the courts of the United States . . . shall be exclusive of the courts of the several States"? Rev. State. § 711. Judicial Code. § 256. 28 U. S. C. § 371. No support can be found for this shifting attribution of meaning to the same concept in the history of proceedings under the Act of 1867. To be sure, it was held under that Act that the State courts were not deprived of jurisdiction of such plenary suits. But that was so for the conclusive reason that the provision making federal jurisdiction exclusive in bankruptcy proceedings came into the law much later than the Act of 1867. Federal exclusiveness as to bankruptcy proceedings formally so-called was brought in by § 711 of the Revised Statutes of 1874. During the few years within which the Bankruptcy Act of 1867 coexisted with the requirement of exclusiveness of jurisdiction in the federal courts, the occasion did not arise for applying the provision excluding the State courts. But this Court was well aware of the problem and carefully put it to one side. See *Claflin* v. *Houseman*, 93 U. S. 130, 133, and *Wilson* v. *Goodrich*, 154 U. S. 640. Intrinsically, that question now presses for decision. If plenary suits are "bankruptcy proceedings" within § 2 of the Act of 1898, as the Court holds, how do they cease to be "proceedings in bankruptcy" as to which the federal courts have jurisdiction "exclusive" of the jurisdiction of the several States?[3] Only a forced disharmony can avoid the griev-

[2] The Act of 1938 substituted "proceedings under this Act."

[3] Note that with regard to the exceptions to § 23 Congress deemed it necessary to confer jurisdiction on the State courts, expressly. See §§ 60 (b), 67 (e), and 70 (e) (3).

ous consequences of a construction equally forced as to the relations between §§ 2 and 23 of the Act of 1898.

9. The Court finds a reversal in the policy of contraction of federal jurisdiction which began with the end of the Reconstruction era, found expression in cases culminating in *Gully* v. *First National Bank*, 299 U. S. 109, and undoubtedly furnished the momentum for the radical reversal of historic policy initiated by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. The Court extends the jurisdiction of the federal courts and, I cannot escape concluding, withdraws it from the State courts. It resolves whatever ambiguity may be found in § 102 of Chapter X by interpolating an exception which effects a break with the past and creates difficulties for the future. One would naturally expect that such an innovation in a matter of vital concern to the scope of federal jurisdiction, with its resulting effect upon the relations between the State and federal courts, would be explicitly stated and not depend for discovery upon intricate exegesis. One would suppose that some indication at least of Congressional awareness of the problem could be found. Diligence of counsel has not unearthed the remotest hint that such shift in jurisdiction was contemplated or that the need for it was asserted. Our own investigation has been equally fruitless. There is nothing in Chapter X, in its terms, its antecedents, its history, its advocacy, that gives the remotest hint of a purpose calling for a different policy for reorganization trustees in this respect from other trustees in bankruptcy, or any intimation that the district courts, other than the particular reorganization court, would play a special rôle as to plenary suits in reorganization proceedings. Nor do the purposes of the Chandler Act bear upon this aspect of jurisdiction. Chapter X provided new facilities for reorganization of bankrupt estates and extended the scope of reorganizations. But it is

hardly relevant to the purpose of easier and more comprehensive methods of reorganization to establish a claim through the federal courts rather than the State courts when the basis of recovery is State law, calling for application of State law and procedure. The Court draws support for its conclusion from the fact that other powers are conferred upon the Chapter X trustee which were not possessed by other bankruptcy trustees. But the powers to which attention is called are all explicitly conferred and are not derived by roundabout inference. And unlike the extension of jurisdiction here claimed, the additional powers conferred on the trustee all bear directly upon the very process of reorganization and the purposes for which Chapter X was designed.

The result has been spun largely out of words in the Act of 1898 by disregarding the controlling facts of its history and its long judicial and practical construction. The other source from which the argument is spun is the provision making § 23 inapplicable to proceedings under Chapter X. As we have seen, our decisions ruled that § 23 was not an exception to § 2 but an emphasis of the limited scope of § 2, together with a grant, of little importance, of consent jurisdiction.* If § 2 did not grant jurisdiction to the district courts over a plenary suit like the one before us, merely eliminating § 23 could add no new head of jurisdiction to § 2. And yet the Court finds that the purpose of making § 23 inapplicable to Chapter X was to throw all the federal courts open to plenary suits in Chapter X proceedings, although, as we have seen, not

* If the provisions rendering § 23 inapplicable to Chapter X proceedings also withdrew jurisdiction by consent, it is not an important matter. In resolving what is at best a jurisdictional ambiguity a result which closes the doors of the federal courts to consenting parties is of minor consequence compared with opening wide the door to a jurisdiction theretofore barred to the federal courts, when Congress manifested no consciousness of such a new grant of jurisdiction.

a clear expression either of such purpose, or an assessment of its consequences, is to be found in all the literature on this subject prior to this litigation. If a perfectly reasonable explanation can be given to the elimination of § 23 from Chapter X proceedings, we ought not lightly to attribute to Congress a radical change affecting the jurisdiction of the federal courts, without even an indirect mention of the need or desirability for such a change in the thousands of pages of legislative hearings, debates, and reports on the various bills leading up to the Chandler Act.

10. There is an adequate explanation for the provision making § 23 inapplicable that amply accounts for it, without using it as a springboard for a wholly unforeseen result out of harmony with established jurisdictional considerations.

The provision to make § 23 inapplicable did not appear in the earlier drafts of Chapter X and was not in the bill as it came from the House. It came into the Act through amendments proposed before the Judiciary Committee of the Senate by the National Bankruptcy Conference through its spokesman, Mr. John Gerdes. His statement is all we have by way of legislative history for the amendment.[5] It will be noted that Mr. Gerdes

[5] See hearings before a subcommittee of the Senate Committee on the Judiciary, on H. R. 8046, 75th Cong., 2d Sess., p. 77:

"Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in corporate reorganizations—where secured as well as unse-

intimated nothing regarding the need for extending federal jurisdiction, nothing of the desirability of granting plenary jurisdiction to all federal courts, nothing to the effect that a Chapter X trustee needed such greater freedom, nothing to indicate that the plan of that Chapter required a different rule as to ordinary plenary suits from that which was reaffirmed as to suits by other bankruptcy trustees. Yet the court below seemed to find in his statement warrant for its result. And it sought to reenforce its conclusion by appeal to an article by Mr. Gerdes elucidating the Chandler Act after its passage. Gerdes, Corporate Reorganizations:

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cured claims are dealt with—would cause great confusion. To make it clear that section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. The priorities under chapter X would therefore be those used in equity receiverships. That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B.

"In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

Another amendment, proposed to the Committee by Mr. Heuston, representing the Special Committee on Bankruptcy of the Association of the Bar of the City of New York, would have made inapplicable to Chapter X some thirty sections of the Act, among them § 23. "The proposed amendment excludes from a reorganization procedure all sections now expressly excluded by § 77B, subdivision (k), as well as many additional sections which have no applicability to a reorganization procedure." This statement makes no reference to plenary suits. "The sections excluded by the proposed amendment, include those which would permit ancillary receiverships, the appointment of receivers before the approval of the petition . . . the bankruptcy provisions relating to priorities, etc." Hearings on H. R. 8046, before a subcommittee of the Senate Judiciary Committee, 75th Cong., 2d Sess., p. 37.

Changes Effected by Chapter X of the Reorganization Act, 52 Harv. L. Rev. 1, 21.

The Circuit Court of Appeals, it seems to me, finds in Mr. Gerdes' observations what he did not put into them. Nowhere is there the remotest suggestion that in this roundabout and undisclosed way he sought to throw all litigation by or against a reorganization trustee into federal courts, other than the reorganization court, because the federal courts might be a more convenient forum. He was concerned with various provisions, of which § 23 was one, which either were intrinsically in conflict with the new provisions of Chapter X or might be deemed to be in conflict with them. He used the terms "inconsistent" and "not applicable" interchangeably. He was concerned with removing all limitations in the existing Bankruptcy Act that were inconsistent with provisions in Chapter X, limitations which might impair the new scheme for bankruptcy reorganization. While Mr. Gerdes was not explicit as to possible inconsistency between § 23 and Chapter X, a controversy which had arisen in regard to § 23 prior to the Chandler Act, and with which he was thoroughly familiar, fully explains why Mr. Gerdes deemed it desirable that § 23 be made inapplicable to Chapter X.

The matter in controversy was this. Section 77B (a) granted the reorganization court the power possessed by an equity court with regard to equity receiverships. The question arose whether a 77B trustee could bring a plenary suit in the reorganization court without regard to diversity citizenship, as could an equity receiver in his home court. *White* v. *Ewing*, 159 U. S. 36. That the reorganization court had such jurisdiction and that § 23 was no bar, was Mr. Gerdes' view. But other bankruptcy specialists and some lower federal courts were of opinion that § 23 precluded such suits. Compare 2 Gerdes, Corporate Reorganizations, 1478, with Finletter, Principles of Corporate Reorganization, 186–87; and see *In re Standard Gas and*

Electric Co., 119 F. 2d 658; *Tilton* v. *Model Taxi Corp.*, 112 F. 2d 86; *In re Prima Co.*, 98 F. 2d 952.

To remove doubt as to this effect of § 23, namely its possible limitation upon the power of the reorganization trustee to sue in his home court, is the full purpose and scope of its elimination from Chapter X. It was not to give the reorganization trustee roving authority for plenary suits in all federal courts that § 23 was made inapplicable. It was a desire to remove the danger that § 23 might be deemed to deprive a reorganization trustee of the power which he ought to have in his reorganization court, that was implicit in the short statement of Mr. Gerdes on behalf of the National Bankruptcy Conference. It is this purpose that prevailed and it is this purpose that should be enforced, and not a radical departure upsetting the distribution of jurisdiction between State and federal courts, for which there is not a vestige of a claim by anybody in the history that led up to the legislation. The article of Mr. Gerdes to which the court below refers seems to leave no doubt as to the limited purpose of making § 23 inapplicable. "The bankruptcy provision restricting plenary jurisdiction," he wrote, "has been expressly excluded from application so that the equity receivership jurisdiction over plenary actions which are ancillary to the main proceedings is still available, even though the controversy involves less than $3,000 and even though there is no diversity of citizenship." 52 Harv. L. Rev. 1, 21.[6] Section 23 was eliminated, then, to make clear that

[6] The discussion in bankruptcy literature of the effect of the provision eliminating § 23 is not only meager but ambiguous. Conflicting arguments can be drawn by giving variant meanings to language susceptible of them, but this only serves to indicate that on such tenuous materials ought not to be based a reversal of jurisdictional policy of far-reaching import.

It is worthy of note that Mr. Gerdes in his article cites as the effect of the elimination of § 23 only the clarification of the jurisdiction of the reorganization court itself over plenary suits. He does not note

when in § 115 of the Act of 1938 Congress gave to the reorganization court equity powers like those which had been conferred in § 77B.(a), it authorized the trustee-receiver to bring plenary suits in his home court. Such also is the view of another important witness in the hearings on the Chandler Bill, see Weinstein, The Bankruptcy Law of 1938, pp. 63–64, 193–94. Compare the analysis of the Chandler Act in 11 U. S. C. A. xxx.

This construction gives scope to the provision making § 23 inapplicable in Chapter X proceedings. It is consistent with the policy of the whole Bankruptcy Act, and gives effect to the grant of equity powers to the reorganization court. On the other hand, nothing in the policy of the Chandler Act, in its language, in its history, or in any other factor relevant to its construction, justifies a finding that Congress, by implication and indirection, without comment or discussion, changed the meaning which this Court had given to its legislation for fifty years, and expanded a federal jurisdiction which is already overburdened and which Congress has tended to contract; that it upset the relation between federal and State courts which demands that, even in bankruptcy, claims created by State law be litigated in local courts, applying local law under local rules of procedure and trial practice, "to the greater economy and convenience of litigants and witnesses."

11. This decision overturns the analysis which has guided the Court in construing the distribution of jurisdiction between the federal and State courts which Congress devised by the Bankruptcy Act of 1898, and attributes to the Act of 1938 a big change in this distribution,

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any expansion of the jurisdiction of the other district courts although, under § 77B, when § 23 was not made expressly inapplicable, it had been his view that other district courts would have plenary jurisdiction as ancillary to the receivership jurisdiction of the reorganization court. See 2 Gerdes, Corporate Reorganization, 1480, 1513–14.

although there is not a glimmer of a hint in its entire legislative history that Congress was aware that it was doing so. Important shifts in jurisdiction ought to be the product of something more persuasive than what is made to appear as a fit of Congressional absentmindedness. It ought not to be deemed natural that Congress took from the State courts long-established jurisdiction and transferred it to the federal courts, when there is nothing to indicate that Congress wanted to do so or knew that it was doing it.

When Congress has not, by plain language, extended the jurisdiction of the district courts which are the feeders of the Circuit Courts of Appeals and of this Court, an unexpressed purpose to swell the dockets of the federal judiciary ought not to be attributed to Congress by considering in isolation the desirability of allowing a particular class of litigation to be brought in a federal court. Any advantage of giving jurisdiction to the federal courts must be balanced against the disadvantages of taking away from the State courts causes of action rooted in State law. And in considering the advantages of absorption by the federal courts of jurisdiction theretofore vested in the State courts, it should be our special concern to be mindful that the district courts are part of a single judicial system. Increase in the scope of the business of the district courts inevitably reflects itself in the business of the Circuit Courts of Appeals and of this Court. It is a truism, but vital to keep in mind, that increase in the quantity of the Court's business affects the quality of its work.[7]

[7] If the Court works under too much pressure, because of the excessive volume of its business, the process of study and reflection indispensable for wise judgment is bound to suffer. Before he became its head, but speaking from close acquaintance with the work of the Court, Chief Justice Taft gave warning that if this Court's business "is to increase with the growth of the country, it will be swamped with its burden, the work which it does will, because of haste, not be of the high quality that it ought to have. . . ." Taft,

Where Congress has clearly enlarged the jurisdiction of the district courts, it cannot be withheld no matter what the effect upon the dockets. But where Congress has not manifested its purpose with clarity—more particularly, where such purpose is derived by way of elaborate argumentation—resolution of jurisdictional doubts properly takes into account the strong policy of Congress, expressed through a series of judiciary acts, not to cast burdens upon the federal courts which interfere with the effective discharge of their functions. See, for instance, *American Security and Trust Co.* v. *District of Columbia*, 224 U. S. 491, and *Phillips* v. *United States*, 312 U. S. 246, 250–51. These are considerations that will seem far afield to the issues of this case only if its decision is not related to the workings of the federal judiciary in the light of its history.

Attacks on the Courts and Legal Procedure (1916) 5 Ky. L. J. No. 1, p. 18. As is well known, it was largely through the leadership of Chief Justice Taft that the Judiciary Act of February 13, 1925, 43 Stat. 936, was passed to enable the Court to keep its business within manageable limits by cutting off the flow of litigation at its various sources. The total number of petitions for certiorari is the most significant index of the Court's business. In the 1927 Term, the first Term during which the influence of the Act of 1925 was fully operative, the total number of such petitions was 587. In the 1946 Term, through June 9, 1947, 1,144 such petitions were considered. Since most of the petitions come from the lower federal courts, any enlargement of their jurisdiction is inevitably reflected in attempts to review those courts here. If it be suggested that the volume of business that will flow from the new head of jurisdiction established by this decision is in itself not likely to be very heavy, it is pertinent to say that it is true of the Court's business also that many a mickle makes a muckle.